DOCUMENT RESUME

ED 167 910 CG 013 315

TITLE	Pretrial Diversion; Performance Standards and Goals for Pretrial Release and Diversion.
INSTITUTION	National Association of Pretrial Services Agencies, Washington, D.C.
SPONS AGENCY	Law Enforcement Assistance Administration (Dept. of Justice), Washington, D.C.
PUB DATE	Aug 78
GRANT	J-LEAA-76-DF-99-0062
NOTE	151p.; For related document see CG 013 316 ; May be marginally legible due to small print
EDRS PRICE	MF01/PC07 Plus Postage.
DESCRIPTORS	*Correctional Rehabilitation; *Criminal Law; Criminals; *Justice; *Legal Aid; *Rehabilitation Programs; *Standards
IDENTIFIERS	*Diversion

ABSTRACT

The goals and standards for pretrial release and diversion are designed to provide guidance and direction to individuals working in the criminal justice system. The materials in this collection deal with the following areas of concern: (1) enrollment diversion guidelines for eligibility; (2) services for participants; (3) dismissal policies; (4) problems of non-completion; (5) confidentiality; (6) program evaluation; and (7) organizational structure of the program. (HLM)

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ED167910

PERFORMANCE
STANDARDS AND GOALS FOR
PRETRIAL RELEASE AND
DIVERSION

DIVERSION

APPROVED: AUGUST 1978

THE BOARD OF DIRECTORS
NATIONAL ASSOCIATION OF
PRETRIAL SERVICES AGENCIES

U S DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
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CG013315

A Project of The National
Association of Pretrial Services Agencies

This project has been carried out under a grant from the U.S. Department of Justice Law Enforcement Assistance Administration (76-DF-99-0062). Points of view expressed herein do not necessarily represent the official views of the U.S. Department of Justice or the Law Enforcement Assistance Administration.

PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL RELEASE AND DIVERSION

PRETRIAL DIVERSION

Approved—By The Board of Directors Of
The National Association Of Pretrial Services Agencies.

August, 1978

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Foreword

The 1960's and 1970's have borne witness to radical changes in the criminal justice system. Rising crime rates and diminishing funds have combined to pressure the system to make the most of its scarce resources. In the midst of this change two significant reforms have occurred.

The now famous Vera experiment which proved that alternatives to surety bond were at least as successful at producing defendants in court as the traditional bail bond practices sparked wide-ranging reform in bail administration. This reform culminated in 1966 in the enactment of the Federal Bail Reform Act. Most states quickly followed the federal lead enacting statutes which were aimed at providing a more even-handed approach to the thorny problems posed by pretrial release considerations. Elimination of discriminatory practices based on ability to pay was the true cornerstone of bail reform.

At the same time, as more and more criminal cases—many of dubious merit—clogged the courts there arose a need to develop alternate methods of dealing with antisocial acts. In many cases the best interests of society and the individuals directly concerned were not well served by the traditional manner of processing. And so diversion was born.

One of the truths about reform—any reform—is that it does not come easy and does not come without cost. Programs that seem just, complete, appropriate, cost-effective, and the like, begin to show deficiencies as they grow. Both bail reform and diversion have been victims of this truth. Means to insure equal treatment, program effectiveness, and due process have been sorely lacking.

During the past decade conscientious observers of the system have begun to speak out about its failings. Judges, Prosecutors, Defenders, and Law Enforcement Officers have looked introspectively at themselves and at their system and have begun to ask not only what is wrong but what can be done about it. From this introspection has emerged a consensus that in order to deliver justice we must first understand what justice is, what its components are, and how it can be measured.

To date the American Bar Association and the National Advisory Commission on Criminal Justice Standards and Goals have led the way in attempting to define some standards against which we can all measure

whether we are coming any closer to being able to administer justice. Prosecutors, Defenders, Police, and others have made various attempts to refine what has been written to suit their own needs.

This effort by the National Association of Pretrial Services Agencies is designed to establish standards for the implementation of sound release and diversion practices. It is an attempt to define what we believe to be achievable goals along the way toward realizing true justice. To the extent that we can we have followed the form and the language of the works of those who have written before us. Where such was not possible we have attempted to fashion standards that do not conflict with our own beliefs of what constitutes true and equal justice.

The project has taken some time. It is by no means finished. Without the many hours of dedication of Madeleine Crohn, James Droege, Barbara Blash, Gordon Zaloom, Janet Gayton, Carol Mercurio, Paul Herzich, John Bellassai and John Youngs we would not have been able to complete as much as we have. In addition to the excellent comments that have been received from many people in many disciplines the suggestions of our own review panel have proved invaluable. But the formation of standards and their implementation is an ongoing process. This project represents only the first step.

Finally, this beginning would not have been possible without the support of NAPSA, the Pretrial Services Resource Center, and The Law Enforcement Assistance Administration of the United States Department of Justice. While the standards do not represent the view of any one group they represent a substantial investment of time and energy by many. I am grateful to them for their support and to Lois Exter for her help in bringing these words to paper.

Bruce Beaudin
Project Director

July 1978

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INTRODUCTION

The concept of diversion is not new. The police officer who chooses not to arrest a delinquent youth, but takes him home for a talk with his parents, exercises in essence a "diversion" decision.[1] The unstructured discretion of a prosecutor to decline to charge or to prosecute in the interest of justice is also diversion in its prototypical form.[2] Youthful offenders whose convictions are set aside under the Federal Youth Corrections Act[3] and similar State statutes are also in a sense "diverted."[4] Indeed, the traditional criminal justice system has always featured techniques and avenues for removing from the normal course of prosecution selected cases and defendants it deemed should not, for a variety of reasons, be so processed despite the presence of a prosecutable case.[5] Such informal diversion, however, being *ad hoc* by its very nature, was open to criticism because it was unstructured and subject to uneven, even unfair, application.[6]

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[1] Klein, M., *Issues and Realities In Police Diversion Programs, in* CRIME AND DELINQUENCY, vol. 22, no., 421 (1976); National Advisory Commission on Criminal Justice Standards and Goals, REPORT ON THE COURTS 27, 33-34 (1973) (hereinafter cited as NAC COURTS REPORT) and REPORT ON THE POLICE 80-82 (1973) (hereinafter cited as NAC POLICE REPORT). *See Generally* Carter, R., and Klein, M., *Police Diversion of Juvenile Offenders* in JUVENILE DIVERSION, REFERRAL AND RECIDIVISM (Lincoln, S., ed.) (Prentiss-Hall, 1975); Brakel, S., *Diversion From the Criminal Justice Process: Informal Discretion, Motivation and Formalization*, 48 DENVER L.J. 211 (1972); La Fave, W., *The Police and Non-Enforcement of the Law*, 1962 WISC. L.J. 104 (1962); Goldstein, L., *Police Discretion Not To Invoke The Criminal Process*, 69 YALE L.J. 543 (1960).

[2] National District Attorney's Association, MONOGRAPH ON PHILOSOPHICAL, PROCEDURAL AND LEGAL ISSUES INHERENT IN PROSECUTOR DIVERSION PROGRAMS 3-4 (1974) (hereinafter cited as NDAA MONOGRAPH); NAC COURTS REPORT, *supra* note 1, at 27; National Institute of Mental Health, DIVERSION FROM THE CRIMINAL JUSTICE SYSTEM 1 (1971); Vorenberg, E., and Vorenberg, J., *Early Diversion from the Justice System: Practice In Search of A Theory in* PRISONERS IN AMERICA 159 (Ohlin, L., ed.) (Prentiss-Hall, 1973) (hereinafter cited as Vorenberg). *See generally* Cox, S., *Prosecutorial Discretion: An Overview*, 13 AMER. CRIM. L. REV. 383 (1976); Miller, F., PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969).

[3] 18 U.S.C. §5010 (a)-(h) (as amended, 1952). (Supp. IV, 1975).

[4] *See* President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: CORRECTIONS 126 (1967); *See also* National Advisory Commission on Criminal Justice Standards and Goals, REPORT ON CORRECTIONS (1973) (hereinafter cited as NAC CORRECTIONS REPORT).

[5] Thomas, C., and Fitch, W., *Prosecutorial Decision Making*, 13 AMER. CRIM. L. REV. 511-513 (1976); Vorenberg, *supra* note 2, at 156.

[6] NDAA MONOGRAPH, *supra* note 2, at 3-5, 13; Vorenberg, *supra* note 2, at 3-5. *See generally* Vera Institute of Justice, PROGRAMS IN CRIMINAL JUSTICE REFORM (1972) (hereinafter cited as Vera Report).

The pressures of overcrowded courts, which "kept presumptively innocent defendants in jail for months or even years awaiting trial,"[7] led the President's Crime Commission to recommend in 1967 that formal, structured alternatives to pretrial incarceration be developed for the non-criminal disposition of large numbers and categories of defendants charged with crime.[8] Except for a small number of state statutes and local programs already scattered across the country, the Commission's Report was the catalyst that led to the widespread proliferation of formalized pretrial diversion programs and procedures.[9] The most structured and most publicized of these early diversion efforts spawned by the 1967 Commission Report were the first and second-round pilot demonstration programs funded by the Manpower Administration of the United States Department of Labor (hereinafter DOL).[10] These DOL model programs

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[7] Report of the President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 131 (U.S. Gov't Printing Office, 1967) (hereinafter cited as Report of the President's Commission). *See also* Vorenberg, *supra* note 2, at 131; and Vera Report, *supra* note 6, at 78-80; and Nimmer, R., TWO MILLION UNNECESSARY ARRESTS (American Bar Foundation, 1971).

[8] Report of the President's Commission, *supra* note 7, at 134.

[9] The Citizens' Probation Authority (CPA) of Flint, Michigan was the earliest community-based pretrial diversion program; it predated the 1967 Report of the President's Commission by three years. *See* Leonard, R., "Deferred Prosecution Program", in *The Prosecutor*, Journal of the National District Attorneys' Association (July-August, 1973), reprinted in SOURCE BOOK IN PRETRIAL CRIMINAL JUSTICE INTERVENTION TECHNIQUES AND ACTION PROGRAMS 43 (American Bar Association Pretrial Intervention Service Center, 1974) (hereinafter cited as SOURCE BOOK). Most of the state statutes which predated the 1967 Report of the President's Commission authorized treatment *in lieu* of prosecution for drug addicts only, and diversion was necessarily to a hospital or custodial setting, not a community-based, outpatient program. *See, e.g.*, CONN. GEN. STAT. ANN. §§19-484, 497 (1969); ILL. REV. STAT. ch. 91-1/2, §120 (1969); N.Y. MENTAL HYGIENE LAW §210 (McKinney, 1971).

[10] The so-called "first round" DOL programs were Project Crossroads in Washington, D.C. and the Manhattan Court Employment Project (MCEP) in New York City. For details generally on the implementation and progress of the two programs, *see* Bellassai, J., *Pretrial Diversion: the First Decade In Retrospect*, PRETRIAL SERVICES ANNUAL JOURNAL 14, 16 and notes 13-15 (Pretrial Services Resource Center, 1978) (hereinafter cited as Bellassai).

The so-called "second round" DOL projects were implemented during 1970-71 in the San Francisco Bay Area, CA (Project Intercept); Atlanta, GA (Atlanta Pretrial Intervention Program); Boston, MS (Boston Court Resource Project); Baltimore, MD (Baltimore Pretrial Intervention Project); Minneapolis, MN (Operation De Novo); Newark, NJ (Newark Defendant Employment Project); Cleveland, Ohio (Cleveland Offender Rehabilitation Program); and San Antonio, Texas (Project Remand). For a narrative description of each project together with an assessment of the impact of each, *see* Abt Associates, Inc., PRETRIAL INTERVENTION: A PROGRAM EVALUATION OF NINE MANPOWER-BASED PRETRIAL INTERVENTION PROGRAMS, FINAL REPORT (1974) (hereinafter cited as ABT REPORT); and Mullen, J., THE DILEMMA OF DIVERSION: RESOURCE MATERIALS ON ADULT PRETRIAL INTERVENTION PROGRAM 11-15, 83-101 (Law Enforcement Assistance Administration, 1975) (hereinafter cited as Mullen).

and others later to be implemented in imitation of them[11] were openly premised on certain ideas which went beyond the impetus for the unstructured, informal diversion which the criminal justice system had always practiced. These tenets of the "new diversion" of the post-1967 period included the following: many defendants, generally poor and disenfranchised, were being endlessly recycled through the criminal justice system; the criminal justice system, with its punishment orientation, was itself criminogenic; the cycle could not be broken because conviction carried with it a stigma that was self perpetuating; non-punitive alternatives to the criminal justice system might break the cycle; and, at some point, the issue of guilt or innocence was irrelevant to the goal of deterring future crime.[12]

Beginning in 1967 diversion efforts of various sorts were implemented on an experimental basis across the country.[13] A decade later, a cursory view of diversion reveals its diversity. Diversion occurs at the pre-arrest, pre-charge, post-charge, and even post-conviction stages.[14] It may or may not lead to dismissal of the charges.[15] It may or may not encompass services to the defendant.[16] It may or may not save money for the courts or reduce the court's caseload.[17] Criteria for program enrollment vary and admission of guilt and restitution may or may not be a part of the process.[18] Diversion programs are operated by private agencies, by probation departments, by community-based organizations, under the auspices of the courts, of prosecutors, of public defenders, *etc.*[19] Diversion is sometimes established by court rule, sometimes by statute, and often just by informal agreement.[20] Programs are funded by the federal government, pri-

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[11] DOL in 1975 funded 10 more manpower model programs, called collectively the "third round" projects, under Title III of the Comprehensive Employment and Training Act of 1974 (CETA). In addition, starting in 1971 with Operation Mid-Way in Nassau County, New York and the New Haven Pretrial Diversion Program in Connecticut, LEAA provided funding for a large number of pretrial diversion programs generally similar in design to the DOL model. *See* Bellassai, *supra* note 10, at 18, 23 and notes 29 and 91, respectively.

[12] *See generally* Vera Report, *supra* note 7; Vorenberg, *supra* note 2; *Hearings on S. 798 Before the Subcomm. on National Penetentiaries of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973).

[13] *See generally* Bellassai, *supra* note 10.

[14] *See* NAC COURTS REPORT, *supra* note 1, at 27-36. *See also* Pretrial Intervention Service Center, "Directory of Criminal Justice Diversion Programs, 1976" (Washington, D.C., 1977).

[15] Abt Report, *supra* note 10, at 80; Mullen, *supra* note 10, at 20-21.

[16] *See* Standards 3.1-3.5, *infra*, and accompanying commentary.

[17] *See* NDAA Monograph, *supra* note 2, at 6-7.

[18] *See* Mullen, *supra* note 10, at 5-23, 73-112.

[19] *See* Bellassai, *supra* note 10, at 26-27.

[20] At least nine states have adopted diversion legislation of varying complexity, while two have state-wide supreme court rules in effect. *See* Bellassai, *supra* note 10, at 19-21. For the text of several of these statutes and both existing state court rules (New Jersey's and Pennsylvania's), *see* AUTHORIZATION TECHNIQUES FOR PRETRIAL INTERVENTION PROGRAMS: A SURVIVAL KIT, Appendices C and D (Pretrial Intervention Service Center, 1977).

vate monies, by local revenue. . .and sometimes simply disappear for want of funding.[21] There are preadjudication diversion alternatives for juveniles, even though the juvenile justice system, itself one of the most comprehensive "diversion programs", was devised as an alternative to a criminal justice system viewed as inappropriate for the adjudication of the cases of children.[22]

A. A Practical Definition of Pretrial Diversion.

Because of the multiplicity of these variations, it is necessary to postulate a working definition of precisely what is meant by the term "pretrial diversion".[23] Given the broad panoply of case processing techniques popularly characterized as diversion, those which uniquely constitute *pretrial* diversion for the purposes of these Standards must be dis-

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[21] For a general survey of diversion program funding sources, *see* ABA Pretrial Intervention Service Center, "Directory of Criminal Justice Diversion Programs, 1976" (Washington, D.C., 1977).

[22] For an overview of the evolution of specific pretrial diversion mechanisms within the juvenile justice system, *see generally Diversion in the Juvenile Justice System: A Symposium*, CRIME AND DELINQUENCY, vol. 22, no. 4 (October, 1976); Cressy, D., and McDermott, R., DIVERSION FROM THE JUVENILE JUSTICE SYSTEM (Ann Arbor, 1973) (a monograph prepared as part of LEAA's National Assessment of Juvenile Corrections Project) (hereinafter cited as Cressy and McDermott); JUVENILE DIVERSION, REFERRAL AND RECIDIVISM (Lincoln, S., ed.) (Prentiss-Hall, 1975); Klapmuts, N., DIVERSION FROM THE JUVENILE JUSTICE SYSTEM (National Council on Crime and Delinquency, 1974); Kobetz, R., and Bosarge, B., JUVENILE JUSTICE ADMINISTRATION, chapter III: "Diversion of Juvenile Offenders: An Overview" (National Association of Chiefs of Police, 1973); Saari, R., DIVERSION WITHIN OR WITHOUT THE JUVENILE JUSTICE SYSTEM (Ann Arbor, 1973) (Prepared for LEAA's National Assessment Project); Baron, R., and Feeney, F., PREVENTING DELINQUENCY THROUGH DIVERSION: THE SACRAMENTO COUNTY PROBATION DEPARTMENT 601 DIVERSION PROGRAM (University of California at Davis, 1972); and Lemert, E., INSTEAD OF COURT: DIVERSION IN JUVENILE JUSTICE (National Institute of Mental Health Center for Studies of Crime and Delinquency, 1971).

[23] The use of the term "pretrial diversion" to describe the process which is the subject of these Standards owes widespread acceptance to its having been used throughout the 1967 Report of the President's Commission on Law Enforcement and Administration of Justice. Several of the terms are frequently employed synonymously, however. For example, the term "pretrial intervention" was devised by DOL in 1968 when implementing the initial manpower pilots. All subsequent DOL-funded programs and activities in the diversion field, including the ABA's Pretrial Intervention Service Center, adhered to this terminology in their publications. The other commonly encountered term is "deferred prosecution", which is preferred by many prosecutors, doubtless due to its early use by Michigan prosecutor Robert F. Leonard when discussing and writing about the CPA program.

The preference for the term "pretrial diversion" in these Standards does not result from a determination that it is more accurately descriptive of the process than the other terms encountered. To the contrary. However, of all of these terms it has become the most generally accepted and the one routinely employed by the Law Enforcement Assistance Administration and NAPSA. Hence its preferred usage here.

tinguished.[24] Therefore, for purposes of these Standards, a dispositional practice is considered pretrial diversion if:

1) it offers persons charged with criminal offenses alternatives to traditional criminal justice or juvenile justice proceedings; and
2) it permits participation by the accused only on a voluntary basis; and
3) the accused has access to counsel prior to a decision to participate; and
4) it occurs no sooner than the filing of formal charges and no later than a final adjudication of guilt; and
5) it results in dismissal of charges, or its equivalent, if the divertee successfully completes the diversion process.

The definition of pretrial diversion advanced here is purposely designed to be inclusive rather than exclusive. It is intentionally broad enough to include pretrial options for all persons charged with law viola-

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[24] A number of commentators have perceived important conceptual differences between the idea of diverting *from* the criminal justice system and diverting *to* another channel; between "traditional" diversion as practiced by prosecutors prior to 1967 and the "new" diversion of the last decade; and between "diversion" and "intervention." *See*, for example, Rutherford, A., and McDermott, R., JUVENILE DIVERSION 3, 4 (LEAA National Evaluation Program, Phase I Summary Report, 1976) (hereinafter cited as Rutherford and McDermott); TREATMENT ALTERNATIVES TO STREET CRIME (TASC): AN EVALUATIVE FRAMEWORK AND STATE OF THE ART REVIEW 6, 7 (Lazar Institute, Washington, D.C., 1975).

The legitimacy of these distinctions notwithstanding, all these differences in approach are subsumed within the practical, working definition of pretrial diversion advanced in these Standards.

These and other Commentators have defined pretrial diversion in various ways, more or less precisely. At least two key "definitions" have received widespread notice and should be alluded to. The National Advisory Commission on Criminal Justice Standards and Goals in its 1973 Report defined pretrial diversion as the "halting or suspending before conviction of formal criminal proceedings against a person on the condition or assumption that he will do something in return." NAC COURTS REPORT, *supra* note 1, at 27. The ABA Pretrial Intervention Service Center, starting in 1974, took the position that

> "the technique is to be distinguished from informal diversion practices (*e.g.* police referrals, juvenile intake adjustments) in that pretrial intervention referrals are based on (i) formalized eligibility criteria, (ii) require participation in manpower, counselling, job placement and educational services for defendants placed in the programs, and (iii) utilization as a real alternative to official court processing, *i.e.* dismissal of formal charges for successful participants."

Biel, M., LEGAL ISSUES AND CHARACTERISTICS OF PRETRIAL INTERVENTION PROGRAMS (ABA Pretrial Intervention Service Center, 1974) (hereinafter cited as Biel.)

As will be noted, *infra*, these Standards more restrictively define pretrial diversion than does the NAC Report yet reject two of the ABA provisos—uniform eligibility criteria and service delivery capability—as definitional necessities. (Both are, however, advocated as operational practices elsewhere in these Standards. *See* Standards 2.1 and 3.2, respectively.)

tions, juveniles as well as adults.[25] Further, though pretrial diversion *programs* are encompassed by this definition, not all pretrial diversion is effectuated *via* the program model popularized by the Manpower Administration pilot programs, *i.e.*, not all are characterized by delivery of services and supervision by workers formally identified as diversion staff.[26] Rather, this definition applies equally to summary pretrial probation practices and post-charge mediation-arbitration procedures which do not feature programmatic components. It applies as well to state-wide statutory schemes of pretrial diversion which may entail delivery of services and supervision by pre-existing, traditional components of government, such as county probation departments.[27] Though possessed of many desirable features referred to throughout these Standards, the community-based service delivery program is not viewed as an intrinsic component of functioning pretrial diversion.[28]

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[25] Because of the sometimes real, sometimes perceived differences between the adult adversary system of criminal justice and the juvenile justice system, promulgation in future of separate standards and goals for juvenile diversion may be appropriate. However, to the extent that juvenile diversion programs currently in operation share the same goals as their adult counterparts, these Standards generally are intended to apply to them as well as to adult diversion. Depending on how closely a given jurisdiction's juvenile justice process resembles the adult adversary trial process, adult-type diversion programs and procedures might be more or less transferable to the juvenile area. *See generally* Kobetz, R., and Bosarge, B. JUVENILE JUSTICE ADMINISTRATION 69-103 (International Association of Chiefs of Police, 1973).

[26] Examples of pretrial diversion programs which do not include a service delivery component include for example the First Offender Treatment (FOT) Program operated by the Office of the U.S. Attorney in Washington, DC. According to remarks by the Hon. Harold H. Greene, Chief Judge of the D.C. Superior Court, at the 1977 National Conference on Pretrial Release and Diversion in Arlington, VA May 11, 1977, approximately 2,000 misdemeanor defendants were diverted *via* the FOT Program in Washington, DC during 1976. *See* 1977 National Conference on Pretrial Release and Diversion, Final Report (Pretrial Services Resource Center and NAPSA, 29 1977). *See also* REPORT OF THE UNITED STATES ATTORNEY FOR WASHINGTON, DC, 1977, at 72-73 (U.S. Department of Justice, Feb., 1978).

An example of a *statutory* pretrial diversion scheme which does not mandate a service delivery component but, rather, only requires that the divertee not be rearrested during the stated period is the New York State Adjournment in Contemplation of Dismissal (ACD) statute, N.Y. CRIM. PROC. L. §§170.55, 170.56 (1973).

[27] A survey of the most recent national listing of pretrial diversion programs illustrates that the independent, community-based service program, operating under informal understandings with the criminal justice system, is no longer the dominant model in the field. Bellassai, *supra* note 10, at 26-27. Relying on the listing of 148 pretrial diversion programs compiled by the ABA Pretrial Intervention Service Center in 1976, the Commentator goes on to note that only 17 percent as of 1976 were sponsored by independent agencies. In contrast, 11 percent were court-affiliated, 16 percent prosecutor-affiliated, and 36 percent were under the control of executive agencies of state or local government, such as county probation departments. *Id.* As noted earlier, at least 11 states now provide for state-wide, pretrial diversion under uniform criteria promulgated by statute or court rule. *See* note 20, *supra*.

[28] *See* note 66, *infra*.

In the view of these Standards, voluntariness is an essential part of the definition of legitimate pretrial diversion.[29] Participation in the diversion process has historically been voluntary on the part of the accused for logical reasons. Once diverted, the accused is required to adjust his actions to meet the requirements of the diversion process, whether that be active participation in an ongoing program of services and supervision or just a responsibility to avoid being rearrested during a prescribed period. Regardless, to require the divertee to adjust his actions during the diversion term to comport with imposed standards, yet to fail to predicate such participation on his free choice denies a role for motivation in the intervention process.[30] In addition, for an accused to participate in pretrial diversion, he necessarily must waive certain constitutional rights including his right to have the government prove his guilt beyond a reasonable doubt, his right to confront his accusers, and his right to a speedy trial.[31] For this reason, requiring the pretrial accused to participate in a diversion scheme which entails waiver of legally-protected rights but which does not first require the free and voluntary waiver of those rights is constitutionally unacceptable.[32]

These twin rationales for voluntariness aside, acceptance of the pretrial diversion option must be voluntary in two distinct senses of the word. First, the divertee must make an informed choice to participate; this choice in turn must be predicated on the opportunity for weighing with counsel the various alternatives which he may pursue and their consequences. Second, the choice must be free and uncoerced, to the extent possible, given the fact that the accused may face prosecution if he does not opt for diversion.[33]

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[29] *See* Standards 1.2-1.4 and 5.1, *infra*, together with their respective commentary. For general discussions of the dilemmas inherent in reconciling voluntariness with diversion enrollment, *See* Goldberg, N., *Pretrial Diversion: Bilk or Bargain? in* NLADA BRIEFCASE, vol. XXXI, no. 6 (1973); Loh, W., *Pretrial Diversion from the Criminal Law*, 83 YALE L.J. 827 (1974) (hereinafter cited as Loh); and Jacobson, H., and Marshall, J., *Defender Operated Diversion—Meeting the Requirements of the Defense Function, in* NLADA BRIEFCASE, vol. XXII, no. 1 (June, 1975) *reprinted in* ABA Pretrial Intervention Service Center's Article Reprints Series as Reprint No. 4 (September, 1975) (hereinafter cited as Jacobson and Marshall).

[30] *Hearings on H.R. 9007 and S.798 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 93d Cong., 2d Sess. 54 (1974).

[31] *See* ABA Pretrial Intervention Service Center, PRETRIAL INTERVENTION LEGAL ISSUES: A GUIDE TO POLICY DEVELOPMENT, 17-32 (Washington, DC, 1977) (hereinafter cited as PRETRIAL INTERVENTION LEGAL ISSUES); Jaszi, P., and Pearlman, H., LEGAL ISSUES IN ADDICT DIVERSION: A TECHNICAL ANALYSIS, 63-89 (Drug Abuse Council, Inc. and ABA Commission on Corrections, 1975) (hereinafter cited as Jaszi and Pearlman); and Skoler, D., *Protecting the Rights of Defendants* in *Pretrial Intervention Programs*, in CRIMINAL LAW BULLETIN, vol. 10, no. 6, at 447-490 (hereinafter cited as Skoler).

[32] PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 31, at 22-25; Jaszi and Pearlman, *supra* note 31, at 63-89.

[33] *See* Standards 1.1-1.4, *infra*, and the accompanying commentary.

Pretrial diversion as herein defined is also premised on the filing of formal charges against the accused by the state prior to the point at which diversion actually occurs.[34] The post charging phase[35] has been chosen for definitional purposes as the earliest point at which diversion should occur because, as the Supreme Court declared in the landmark case of *Kirby* v. *Illinois*,[36] it is only then that the investigatory stage of the criminal case has come to completion and the government has decided whether or not to prosecute the accused.[37] Only by reserving the diversion decision until this point in the processing of a criminal case can the criminal justice system and society be confident that diversion will not be used as a device to retain in the system unprosecutable cases or meritorious cases which, because of their minor nature, otherwise would not be prosecuted.[38] Not until the attorney for the government has elected to file an information against the defendant can other parties—the accused, defense counsel, and the court, in particular—form independent opinions as to whether the facts and circumstances of the arrest appear to support probable cause and whether the nature of the offense charged is such that diversion appears to be the most desirable dispositional route available.[39]

Entry into diversion only after the filing of formal charges may well be mandated by the Supreme Court. The Court in the recently decided case of *Gerstein* v. *Pugh*[40] held that the Fourth Amendment requires that all persons arrested without a warrant and charged by a prosecutor's information be afforded a "judicial determination of probable cause as prerequisite to extended restraint of liberty following arrest."[41] Although the facts in *Gerstein* were limited to the situation of pretrial confinement, the Court noted that "[e]ven pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty. . . When the

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[34] These Standards take this position notwithstanding the fact that many pretrial diversion programs as currently designed intervene sometimes or always at the pre-changing (*i.e.* pre-prosecutorial papering) stage. NAC COURTS REPORT, *supra* note 1, at 33-34; PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 31, at 11-12; ABA Pretrial Intervention Service Center, "Directory of Criminal Justice Diversion Programs, 1976" (Washington, DC, 1977).

[35] Due to differences in state criminal procedure laws, the exact point at which the prosecution (as distinguished from the police investigatory stage) of the case begins will vary. *See, e.g. Moore* v. *Oliver* 347 F. Supp. 1313, 1319 (W.D. Va., 1972) (no "magic words" delineate for all purposes at what stage of the state's case the prosecution can be said to begin for Sixth Amendment purposes); and *U.S. Ex rel. Robinson* v. *Zeiken*, 468 F.2d 159 (2d Cir. 1972) (ruling prosecution under New York law commenced, for purposes of right to counsel, with issuance of arrest warrant).

[36] 406 U.S. 682 (1972).

[37] *Id.* at 689.

[38] NAC COURTS REPORT, *supra* note 1, at 35; Jacobson and Marshall, *supra* note 29, at 2-3.

[39] PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 31, at 12, 20-21; Jaszi and Pearlman, *supra* note 31, at 83-86.

[40] 420 U.S. 103 (1975).

[41] *Id.* at 105.

stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty."[42]

The Court seems to be saying that where there is any significant restraint of liberty, a probable cause hearing must be held if the basis of the charge is solely a prosecutor's information.[43] Commentators have argued that though ostensibly voluntary, pretrial diversion in fact is inherently coercive; as a consequence it entails a significant restraint on liberty and falls within the scope of *Gerstein*, thereby necessitating a probable cause hearing before the decision to divert is made.[44] Since no probable cause hearing can take place until the filing of formal charges, it is therefore argued that both steps should properly precede the point at which the diversion decision is made.[45]

If diversion occurs post-charge the accused is given an opportunity to confer with counsel. Such a procedure relates directly to the voluntariness issue raised earlier with regard to pretrial diversion: the filing of an information is the first time that the accused is made aware of the actual charge(s) for which he will be prosecuted (provided he does not choose pretrial diversion). Knowledge of the charge(s) and the possible consequences of conviction are essential to the accused's making an informed, voluntary choice of whether to opt for diversion or to proceed to plea negotiation or trial.[46] Only when he has had access to counsel can the accused intelligently weigh alternative strategies and knowingly and voluntarily waive certain constitutional rights when making the decision to enter pretrial diversion.[47] In many jurisdictions, the diversion decision is made at the arraignment/presentment stage of proceedings.[48] Obviously in those situations, formal filing has already occurred and since arraignment/presentment is a critical stage of the criminal process,[49] counsel

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[42] *Id.* at 114.

[43] PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 31, at 20-21.

[44] *See, for example,* Note, *Pretrial Diversion from the Criminal Process: Some Constitutional Considerations,* 50 IND. L. REV. 783, 795 (1975).

[45] *Ibid.*

[46] "Without notice of formal charges, the divertee may not be able to preserve the means for an effective defense." PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 31, at 12. *See also* Standard 1.1, *infra,* and accompanying commentary.

[47] *See* PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 31, at 18-19 (voluntariness considerations at intake in adult diversion) and 48-49 (importance of access to counsel in juvenile diversion situations); Jaszi and Pearlman, *supra* note 31, at 89; Jacobson and Marshall, *supra* note 29, at 3-4; Skoler, D., *supra* note 31, at 488-489 and note 48. *See also* ABA Standards Relating to Providing Defense Services, *Standard 5.1, Initial Provision of Counsel; Notice,* and Commentary thereto (Approved Draft, 1968).

[48] *See* Pretrial Intervention Service Center, "Directory of Criminal Justice Diversion Programs, 1976" (Washington, DC, 1977) (details, among other facts, the point(s) of intervention for 148 pretrial diversion programs nationwide).

[49] *Doughty* v. *Maxwell,* 372 U.S. 78 (1973); *Kirby* v. *Illinois,* 406 U.S. 682, 689 (1972).

must be retained or appointed by that time.[50] In jurisdictions where the diversion decision occurs prior to formal filing, right to counsel is rarely accorded at that stage.[51] This is a major consideration prompting these Standards to recommend that diversion decisions be made after the formal charge has been settled upon. Diversion programs which interview and enroll candidates pre-charge are encouraged to adjust their practices to meet the voluntariness concerns raised above. It is the position of these Standards that absent knowledge of the precise charge(s) being faced, obtainable only after the filing of a prosecutor's information, and absent access to counsel, the diversion decision on the part of the accused cannot be considered voluntary.[52]

Further, these Standards take the position that as long as diversion occurs prior to final adjudication of guilt, it constitutes pretrial diversion for all practical purposes and comes within the parameters of our definition.[53] To the extent that this definition excludes postsentencing alternatives to imprisonment, it narrows the scope of the subject matter. The definition excludes various types of community corrections programs.[54] From a procedural perspective this limitation is unavoidable. Unlike probation, work release and other alternatives to incarceration, the entire thrust of pretrial diversion as a distinct case processing technique is to remove a deserving case from the adversary system prior to imposition of sentence. The diverted defendant is offered a non-criminal disposition in return for successful completion of diversion.[55] It is therefore axiomatic that in order to be an alternative to full prosecution, successful pretrial

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[50] Jaszi and Pearlman, *supra* note 31, at 84-86; PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 31, at 25; Skoler, *supra* note 31, at 489 and note 48. *See also* NLADA National Study Commission on Defense Services, DRAFT REPORT AND GUIDELINES FOR THE DEFENSE OF ELIGIBLE PERSONS, vol. II, at 1002-1004 (1976).

[51] A survey of the most recent published listing of 148 diversion programs indicates that a very high percentage intervene at the pre-charging stage, while many others intervene post-charging but pre-arraignment. *See generally* "Directory of Criminal Justice Diversion Programs, 1976" (ABA Pretrial Intervention Service Center, 1977). The Supreme Court has indicated that there is no clear right to counsel prior to the point at which formal charges by the prosecutor are filed. *U.S. v. Wade*, 388 U.S. 218 (1967).

[52] *See* Standards 1.1 and 2.6, *infra*, together with their respective commentaries.

[53] *See* notes 59-62, *infra*, and Standards 2.3 and 4.1, *infra*, together with their respective commentaries.

[54] This is not to be construed to mean that these post-adjudication alternatives to incarceration are not equally legitimate or equally needed as is pretrial diversion. Rather, they are so procedurally distinct as to fall necessarily outside the purview of these Standards. For a survey of various post-adjudication community-based corrections models, *see generally* NAC CORRECTIONS REPORT, *supra* note 4; Galvin, J., INSTEAD OF JAIL, PRE- AND POST-TRIAL ALTERNATIVES TO JAIL INCARCERATION (LEAA, 1977); and Klapmuts, N., *Community Alternatives to Prison*, CRIME AND DELINQUENCY LITERATURE, vol. 19, no. 3, 305 (June, 1973).

[55] NAC COURTS REPORT, *supra* note 1, at 27-28; Nimmer, R., DIVERSION: THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION, 45 (American Bar Foundation, 1974) (hereinafter cited as Nimmer); *Hearings on S.798 and H.R. 9007 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary*, 93d Cong., 2d Sess., 144 (1974) (hereinafter cited as 1974 House Hearings) (testimony of Yale Law School Professor Daniel J. Freed).

diversion must be *in lieu* of sentencing. Just as sentencing presupposes a final determination of guilt on the record as a matter of law, pretrial diversion is premised on the removal of the defendant's case from the criminal justice system before this point in the processing of the case has been reached. To offer a divertee anything less than a dismissal of pending charges upon successful completion leaves the defendant enmeshed in the traditional adversary system and diversion becomes no alternative at all.

On the other hand, if the practical end result of successful pretrial diversion is to avoid the stigma and other unfortunate consequences which flow from sentencing, then any process which accomplishes this result should be included in the ambit of the definition. Thus, from one perspective, the definition of pretrial diversion stipulated here encompasses everything from post-charge mediation and arbitration programs which lead to dismissal of pending charges,[56] to procedures for summary "pretrial probation", which require simply that the defendant not be rearrested for a stated period in order to have pending charges dropped,[57] to structured programs of service delivery and supervision along the lines of the DOL model.[58]

From another perspective, as long as the diversionary mechanism in question provides the opportunity for dismissal of pending charges and avoidance of a criminal conviction record, the procedural purpose of pretrial diversion has been served. In this regard, while the majority of pretrial diversion statutes and programs divert prior to the point at which a guilty plea is entered or conviction at trial has occurred, a few require conditional determination of legal guilt on the record. Later the record of

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[56] The American Arbitration Association's "Four-A Project," operational in the criminal courts of Philadelphia, PA is an example of this approach.

[57] A statutory example of this approach is New York's Adjournment in Contemplation of Dismissal (ACD), N.Y. CRIM. PROC. L. §§170.55, 170.56 (1973). During its first year on the books, it diverted 19,145 defendants in the City of New York, the only requirement of diversion being no rearrest within the following six-month period. *See* DIVERSION FROM THE JUDICIAL PROCESS: AN ALTERNATIVE TO TRIAL AND INCARCERATION, Report by the Subcommittee on Elimination of Inappropriate and Unnecessary Jurisdiction of the N.Y. State Supreme Court, Dep'tal Committees on Court Administration, at 56-60 (1975).

[58] Despite procedural variations and differing sorts of clientele, the services-plus-supervision program model, inspired by the CPA Program and the early DOL manpower pilots, remains the predominant vehicle for pretrial diversion. NAC COURTS REPORT, *supra* note 1, at 37; Bellassai, *supra* note 10, at 16.

guilt is removed and replaced with a dismissal once the diversion requirements have successfully been met.[59] Other diversion statutes and local programs require otherwise eligible defendants to sign affidavits or stipulations of the facts of the underlying arrest; if diversion is successful these admissions are destroyed. If the defendant fails, the stipulations can be introduced into evidence should the prosecution be resumed.[60] Still others require a so-called informal admission of factual or moral guilt (as distinguished from legal guilt), whether made publically on the record, or *ex parte*, either before or after being diverted.[61] Many programs require some or all divertees to make restitution, whether monetary or symbolic, to the victim of the crime charged. This requirement is an explicit admission of factual guilt and an implicit admission of legal guilt.[62] While these Standards oppose the use of a conditional guilty plea or similar devices as a precondition of diversion[63] and caution against the dangers of the overbroad use of restitution and related techniques which articulate moral or factual guilt,[64] such procedures do not place programs that use these techniques outside the scope of these Standards.

Finally, it is the position of these Standards that pretrial diversion is a procedural alternative to the traditional adversary system of prosecution, adjudication and sentencing. As such, pretrial diversion is result-oriented and should be viewed as a process which may or may not be effectuated

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[59] This Procedure appears to be rare with regard to non-statutory diversion programs. A few examples do exist, however. *See, for example,* ANNUAL REVIEW OF OPERATIONS, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, FOR 1974, 56-57 (description of conditional guilty plea procedure utilized by that court's Narcotics Diversion Project); Narimatsu, K., *Deferred Prosecution and Deferred Acceptance of a Guilty Plea* (description of the DAGP Program operated by the District Attorney's Office in Honolulu, Hawaii) in National District Attorneys Association, A PROSECUTOR'S MANUAL ON SCREENING AND DIVERSIONARY PROGRAMS 225 (Chicago, 1972) (hereinafter cited as NDAA Manual); Abt Associates, Inc., REPORT ON OPERATION OF PROJECT INTERCEPT 1-12 (1971) (description of requirement for imposition of guilty plea and sentence of informal probation for divertees in San Francisco Bay area DOL-manpower program, which are replaced on the record by a dismissal upon successful completion.)

The guilty plea requirement is more common in programs authorized by statute; usually those expressly for drug addicts. *See, e.g.*, §404(b)(1) of the federal Controlled Substances Act of 1970, Pub. L. 91-513, 21 U.S.C. §844(b)(1) (1970); ILL. REV. STAT. ch. 91-1/2, §120.9 (1969); and N.J.S.A. 24:21-27 (modeled on federal CSA).

[60] An example of a program which takes this approach is the Albuquerque, New Mexico diversion program. For procedural details, *see Second Judicial District Attorney's Pre-Prosecution Probation Program*, in 12 N.M. State Bar Bulletin 530 (October 11, 1973).

[61] The best known, but by no means only, example of a program which employs the "moral admission" of guilt device is the Citizens' Probation Authority (CPA) of Flint, Michigan. For details, *see Deferred Prosecution And Criminal Justice: A Case Study of the Genesse County Citizens' Probation Authority* (Report of the State of Michigan Office of Criminal Justice Programs), *reprinted in* NDAA Manual, *supra* note 59, at 146.

[62] *See Deferred Prosecution and Criminal Justice: A Case Study of the Genesee County Citizens' Probation Authority, in* NDAA MANUAL, *supra* note 59, at 42-43; PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 31, at 33-35.

[63] *See* Standard 2.3, *infra*, and accompanying commentary.

[64] *See* Standard 3.4, *infra*, and accompanying commentary.

via a programmatic component. The four-fold definition of pretrial diversion advanced in these Standards is set out in such a way as to comport with this distinction. This is not to say that these Standards do not advocate the presence of certain features as important adjuncts to any diversion effort—uniform eligibility criteria, to cite one example, or service delivery or referral capability, to cite another.[65] These considerations are not viewed as central to the definition of pretrial diversion. Rather, they are seen as operational concerns within an ongoing pretrial diversion process. As such, they are addressed in the Standards, themselves.[66]

B. Diversion In the Context of Modern Correctional Thinking.

These Standards apply to programs servicing the needs of defendants who, through the fact of arrest, have entered the criminal justice system but whose cases have not yet been adjudicated. Nevertheless, like the emerging pretrial diversion discipline itself, the utility of the principles advanced in these Standards will be assessed by many in terms of their consistency with general trends in corrections and criminology as espoused by legislators, funding sources, criminal justice policymakers and planners and, ultimately, society at large. In this regard, it is suggested that pretrial diversion advances the purposes of both major schools of correctional thinking in vogue today—the traditional rehabilitationists

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[65] *See* Standards 2.1 and 3.1-3.3, *infra*, respectively.

[66] In removing such operational considerations from a basic working definition of pretrial diversion, these Standards admittedly take a different approach from that of the ABA Pretrial Intervention Service Center. *See* note 24, *supra*.

In viewing pretrial diversion as a "process" but not necessarily as a "program", these Standards attempt to come to grips with recent criticisms that diversion often results in the creation of a new layer of personnel affiliated with the criminal justice system which merely duplicates the post-adjudication service delivery and supervision functions of other, separate personnel, thereby increasing costs and widening the net of social controls. As one commentator has noted with regard to JUVENILE DIVERSION,

> [t]he emphasis of "traditional diversion" was on processes (discretion) whereas the emphasis in the "new diversion" [post-1967] is on process plus programs (discretion and "services"). Thus, the proliferation of service programs may reduce "traditional diversion" and increased contact between youths and the juvenile justice system. As a consequence, the net of the juvenile system will have been widened rather than narrowed.
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> Legal type processes/programs may engage in diversion by merely initiating discretionary judgments to terminate processing and/or referring a youth to a program outside the juvenile justice system. The process of implementing discretion may be accomplished by changes in administrative guidelines and/or training or retraining existing staff. . . Such reorganization or reorientation does not entail the expenditure of large amounts of special funding dollars.
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> Direct services [in contrast] may entail significant increase in staff, equipment and possibly physical space; this means a need for increased funding.

Rutherford and McDermott, *supra* note 24, at 26, 33-34.

and the so-called "new corrections" school which advocates, among other things, fixed sentences.[67] Just as the diversion discipline often serves the aims of both traditional and "new corrections" thinkers, these Standards advocate particular practices and approaches which may appear to be extensions of one or both philosophies, depending on the purpose to be served.

In this respect it is the position of these Standards that the goals of pretrial diversion and the practices recommended here in order to achieve these goals have legitimacy independent of the perceived merits of contending schools of correctional thinking. Various aspects of the Standards will doubtless appear to advocate particular practices consistent with one philosophy while other aspects may advocate practices which advance the other. It must be remembered that what follows seeks to describe and advocate practical, workable, legally permissable and humane techniques for operating diversion programs, once the decision to implement diversion has been made at the local level.

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[67] For a general overview of the philosophy of rehabilitation as the prime goal of the criminal justice system, *see* Sutherland, E., and Cressy, D., CRIMINOLOGY 52-54 (8th ed., 1970). According to one commentator,

> [t]he highwater mark of the rehabilitative ideal in American criminal justice is represented by the President's Commission on Law Enforcement and the Administration of Justice. The Commission recommended that the scope of the traditional punitive criminal law be reduced by increasing community responsibility for the prevention and cure of deviance and crime.

Gorelick, J., *Pretrial Diversion: The Threat of Expanding Social Control*, 10 Harvard Civ. Rights—Civ. Lib. L. Rev. 190 (1975) (hereinafter cited as Gorelick). The Commentator goes on to note that

> [t]he rehabilitative school has its roots in the thinking of Cesare Lombroso, who believed that criminals differ from non-criminals in traits of personality which promote tendencies to commit crimes.
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> . . . . . .
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> Lombroso's thinking influenced the development of both the psychiatric school, which looks to criminals' psychiatric problems as the source of their criminal behavior, and the sociological school, which focuses on the social environment for the causes of criminal behavior. Both schools recommend that the degree and nature of social intervention in a criminal's life should depend not on the crime but on the cause of his criminality and the prognosis for reformation.

Id. at note 189.

The "new corrections" school (sometimes called "revisionist" and sometimes "anti-rehabilitationist", depending on the biases of the commentator) in contrast argues that experience shows that rehabilitation does not generally succeed. Instead, they advocate that punishment or sanction should be the explicit as well as implicit purpose of the criminal law and that the degree of sanction meted out should be dictated by the extent of harm done and the degree of the defendant's culpability for the criminal act in question. *See generally* Von Hirsch, A., DOING JUSTICE: THE CHOICE OF PUNISHMENTS, Report by the Committee for the Study of Incarceration (Hill and Wang, 1976) (hereinafter cited as DOING JUSTICE); Wilks, J., and Martinson, R., *Is the Treatment of Offenders Really Necessary? in* 40 FEDERAL PROBATION 3-9 (1976); Lipton, D., Martinson, R., & Wilks, J., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT (Praeger, 1975); Morris, N., THE FUTURE OF IMPRISONMENT (Univ. of Chicago Press, 1974); Martinson, R., *What Works—Questions and Answers About Prison Reform, in* 35 THE PUBLIC INTEREST 22-54 (1974).

Pretrial practitioners, as well as most outside observers, have tended to view diversion as geared primarily toward achieving rehabilitation and crime prevention.[68] Moreover, it is readily apparent that diversion has repeatedly been touted in grant applications, program evaluations, final reports, and legislative testimony as a rehabilitative and preventive strategy.[69] Viewed thus, diversion is not only consistent with the traditional rehabilitation theory which has dominated correctional thinking in this century but is an expansion of it.[70] There exists an additional unstated purpose for diversion which makes it an attractive alternative for front-line criminal justice officials and is much more akin to the so-called "anti-rehabilitationism" approach of new corrections: this is the fact that pretrial diversion is also an expeditious screening and processing technique for non-serious cases which leads to early outtake, rehabilitation aside.[71]

Those stated aims of pretrial diversion which are consistent with the general rehabilitationist ideal of community corrections are straight-forward and readily apparent: diversion, if successful, hopes to change behavior patterns in divertees which have led to, and can be expected in the future to again lead to, arrests. In the process it strives to address socio-economic needs, re-channel participants back into employment and/or school, build self-esteem and healthy attitudes through counseling, and generally to eliminate societal dysfunction.[72]

At the same time, tenets of the "new corrections" which are advanced by widespread use of diversion are less obvious, often implicit but equally present in the process. For example, advocacy by "new corrections" proponents of the theory of "minimization of penetration" into the criminal justice system for many types of minor offenses and non-hardened defendants—based on the twin rationales that certain types of charges are by their nature less deserving of the expenditure of time and manpower to prosecute and that exposure to the criminal justice system is itself criminogenic—leads naturally to widespread use of pretrial diversion, especially in overburdened urban court systems.[73]

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[68] *See generally* NAC COURTS REPORT, *supra* note 1; *1974 House Hearings*, *supra* note 55; Vera Report, *supra* note 2; Abt Report, *supra* note 10.

[69] *See, e.g.*, Mullen, *supra* note 10, at 5-19, 74 (survey of stated goals for 13 of the early DOL and LEAA-funded pilot programs).

[70] Gorelick, *supra* note 67, at 189-200.

[71] *See* NAC COURTS REPORT, *supra* note 1, at 33; NDAA Monograph, *supra* note 2, at 6-7.

[72] NAC COURTS REPORT, *supra* note 1, at 33, 37; NDAA Monograph, *supra* note 2, at 6-7; REPORT OF THE PRESIDENT'S COMMISSION, *supra* note 8, at 133; NAC CORRECTIONS REPORT, *supra* note 4, at 75-76; Abt Report, *supra* note 10, at 18.

[73] *See* NAC COURTS REPORT, *supra* note 1, at 28; *1974 House Hearings*, *supra* note 55, at 75-76; Nimmer, *supra* note 55, at 45.

Likewise, the theory of commensurate desserts,[74] which argues that the intensity of punishment[75] meted out by the justice system should be based on the seriousness of the present offense charged and past conviction record rather than on a given defendant's amenability to rehabilitation (which, in turn, implies a medical-model treatment of disfavored behavior as an illness), is consistent with widespread use of diversion. When a criminal justice system uniformly offers certain categories of defendants the pretrial diversion option because of the non-serious nature of the offense charged and or the defendant's status as a first or second offender, yet bars or presumptively opposes diversion eligibility to other defendants in more serious cases, this theory is actively at work, legal presumption of innocence notwithstanding.[76]

These and other doctrines of the "new corrections" as expostulated by several noted criminologists in recent years,[77] are advanced, wittingly or unwittingly, by the use of pretrial diversion for selected classes of defendants as one of many graduated responses to the problems of case processing by a justice system which attempts to react rationally to the pressures it faces.[78]

C. Recent Criticisms in Perspective.

The early 1970's saw the explosive expansion of pretrial diversion programs, triggered by the widely-publicized successes of three pre-1970 community-based programs,[79] as detailed in Final Reports of varying

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[74] For a full explication of this theory of graduated sanction in response to increasing blameworthiness of the perpetrator and severity of the anti-social act perpetrated, *see generally* DOING JUSTICE, *supra* note 67.

[75] It must be stressed that the authors of DOING JUSTICE, like most other "new corrections" criminologists, are advocates of decarceration. Punishment as used by these commentators means "sanction", not confinement. Alternatives to incarceration of various sorts are the recommended presumptive sentences for all but the most serious offenses and most incorrigible and dangerous of defendants. *See* DOING JUSTICE, *supra* note 67.

[76] *See, e.g.*, NDAA Monograph, *supra* note 2, at 9; Skoler, *supra* note 31, at 1-2; Flaschner, *The Boston Court Resource Project: A Pretrial Diversion Alternative*, 13 JUDGES' JOURNAL 18 (1974); Specter, A., *Diversion of Persons from the Criminal Justice Process to Treatment Alternatives*, 44 PA. BAR ASS'N. Q. 691 (1973) reprinted in SOURCE BOOK, *supra* note 9, at 16, 21.

[77] *See* note 67, *supra*.

[78] *See, e.g.*, Weissman, J., *Considerations in Sentencing the Drug Offender, in* JOURNAL OF PSYCHEDELIC DRUGS, vol. 9, no. 4, at 301-309 (Oct.-Dec., 1977).

[79] The Citizens' Probation Authority (CPA) of Flint, Michigan; Project Crossroads in Washington, DC and the Manhattan Court Employment Project (MCEP) in New York City. *See* notes 9, 10, *supra*. For an overview of these programs as they developed in the context of the early phase of diversion program evolution, *See* Bellassai, *supra* note 10, at 16 and notes 10-14. *See also* Mullen, *supra* note 10, at 16 (CPA) and 7 (Crossroads and MCEP).

sophistication.[80] The claims which had been advanced by those early programs, and were seemingly substantiated through what were generally termed "program evaluations," were repeated by newer programs and often expanded upon: diversion substantially reduced recidivism; it resulted in major cost savings and case backlog reductions for the criminal justice system; it avoided incarceration and the stigma of conviction for successful participants; it developed viable employment opportunities; and it replaced dysfunctional behavior with patterns of socially productive behavior (*e.g.*, holding a job, paying taxes, *etc.*) in divertees.[81]

Too often diversion proponents fell into the trap of suggesting that such short-term interventions (typically 60-90 days) could overcome, for large numbers of defendants and in measurable ways, the debilitating effects of economic deprivation, discrimination, and general societal alienation which are the legacies of the bulk of those criminally prosecuted—minorities and the poor.[82] It has been well documented that factors such as disrupted homes, inferior education, lack of marketable skills and poor or nonexistent prior work histories are typical problems confronting the majority of defendants, especially in the nation's cities.[83] Though advo-

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[80] *See* NDAA Manual, *supra* note 59, at 7 (reprint of CPA Final Report); National Committee for Children and Youth, FINAL REPORT, PROJECT CROSSROADS—PHASE I (January 15, 1968-May 15, 1969), (Washington, DC, 1972); and THE MANHATTAN COURT EMPLOYMENT PROJECT OF THE VERA INSTITUTE OF JUSTICE, SUMMARY REPORT ON PHASE ONE: November 1, 1967-October 3, 1969 (New York, 1970). For general critiques of the quality of these early evaluation program reports, *see* Mullen, *supra* note 10, at 7-11, 16-19; and Rovner-Pieczenik, R., PRETRIAL INTERVENTION STRATEGIES: AN EVALUATION OF POLICY-RELATED RESEARCH AND POLICY-MAKER PERCEPTIONS, EXECUTIVE SUMMARY, 6-7 (ABA Pretrial Intervention Service Center, 1974) (hereinafter cited as Rovner-Pieczenik).

[81] *See, e.g.*, deGrazia, E., REPORT ON PRE-TRIAL DIVERSION OF ACCUSED OFFENDERS TO COMMUNITY MENTAL HEALTH PROGRAMS (Geo. Univ., Washington, DC, undated); Vera Report, *supra* note 6; Abt Report, *supra* note 10, at 18; Specter, A., *Diversion of Persons from the Criminal Justice Process to Treatment Alternatives*, 44 PA. BAR ASS'N Q. 691 (1973), *reprinted in* SOURCE BOOK, *supra* note 9, at 16; NAC COURTS REPORT, *supra* note 1, at 28-31; Henschel, B., *Reflections On A Functioning Pretrial Diversion Project*, in NDAA Manual, *supra* note 59, at 191; *1974 House Hearings*, *supra* note 55, at 63 (testimony of Genesee County Prosecutor Robert F. Leonard).

See generally ABA Pretrial Intervention Service Center, DESCRIPTIVE PROFILES OF SELECTED PRETRIAL CRIMINAL JUSTICE INTERVENTION PROGRAMS (1974) and SOURCE BOOK, *supra* note 9.

[82] *See, e.g.* Crossroads Final Report, *supra* note 80;
Vera Report, *supra* note 6, at 78-80; Report of the President's Commission, *supra* note 8, at 293-301 (Recommendations Section).

[83] *See generally* American University Law School, Institute for Advanced Studies in Justice, CRIME AND EMPLOYMENT ISSUES (Leiberg, L., ed.) (DOL Office of Research and Development, 1978); Gillespie, R., ECONOMIC FACTORS IN CRIME AND DELINQUENCY: A CRITICAL REVIEW OF THE EMPIRICAL EVIDENCE (LEAA, 1975); Swisher, Ralph, UNEMPLOYMENT AND CRIME (LEAA, 1975); Glaser, D., ADULT CRIME AND SOCIAL POLICY (Prentiss-Hall, 1972); Levitan, S., *et al.*, ECONOMIC OPPORTUNITY IN THE GHETTO (Johns Hopkins Univ. Press, 1969); Friedman, M., and Pappas, N., *The Training and Employment of Offenders*, Report to the President's Commission on Law Enforcement and Administration of Justice (U.S. Gov't Printing Office, 1967).

cates usually were careful to state that pretrial diversion should not be viewed as a panacea, in practice they were ascribing just such effects to diversion in grant applications, program final reports, and narrative commentaries.[84]

Such unrealistically broad expectations inevitably led to shortfall results.[85] These in turn have led to skepticism on the part of many policymakers and planners and to open opposition from various quarters—most notably the defense bar, civil libertarians, noted criminologists and professional researchers.[86]

As more data on diversion participants, both those presently enrolled and those who completed the process, began to be generated, the confident claims of the early years were each challenged:

- The diversion process often required at least as many court appearances as would have been necessary in the absence of diversion—even more were needed in the event of unfavorable termination from diversion and renewed prosecution.[87]
- While successfully completed diversion cases reduced court backlogs, in those overburdened systems which diverted many cases, the comparative caseload reduction was modest.[88] Moreover, when terminated cases were returned for prosecution, the extra time and costs involved aggravated the problem of court congestion.[89]
- Since few first offenders or defendants convicted of non-serious charges tended to be incarcerated after conviction, diversion in most instances was an alternative to probation, not to confinement.[90]

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[84] This is the conclusion reached by a number of recent commentators who have surveyed the claims and goals advanced by the early pilots. *See, for example,* Loh, *supra* note 29, at 827-854; and Johnson, P., *Pretrial Intervention: The Administration of Discretion,* 27, reprinted in "Conference Proceedings," 1977 National Conference on Pretrial Release & Diversion (NAPSA & PSRC, Arlington, VA, May, 1977).

[85] Numerous recent works have reviewed diversion's supposed shortfalls. Perhaps the three most objective and informative are Kirby, M., *Recent Research Findings in Pretrial Diversion,* ALTERNATIVES—A SERIES: FINDINGS 2 (Pretrial Services Resource Center, 1978) (hereinafter cited as Kirby); Zimring., 3, *Measuring the Impact of Pretrial Diversion from the Criminal Justice System,* 41 UNIV. CHI. L. REV. 224 (1974) (hereinafter cited as Zimring); and Rovner-Pieczenik, *supra* note 80. *See also 1974 House Hearings, supra* note 81, at 144-148 (statement of Yale Law School Professor Daniel J. Freed).

[86] *See,* for example, Goldberg, N., *Pretrial Diversion: Bilk or Bargain?* 31 NLADA Briefcase 6 (1973); Nejelski, P., *Diversion: The Promise and the Danger, reprinted in* CRIME AND DELINQUENCY, vol. 22, no. 4 at 393 (October, 1976) (hereinafter cited as Nejelski); Gorelick, *supra* note 80, at 194-200; Rovner-Pieczenik, *supra* note 80 at 6-11, and Kirby and Zimring, *supra* note 85, at 29-30 and 241, respectively.

[87] *1974 House Hearings, supra* note 55, at 157 (testimony of Professor Daniel Freed).

[88] Rovner-Pieczenik, *supra* note 80, at 89-92.

[89] *See, e.g., 1974 House Hearings, supra* note 81, at 157 (testimony of Professor Daniel Freed).

[90] *See* Abt Report, *supra* note 10, at 81; Gorelick, *supra* note 67, at 195; Zimring, *supra* note 85, at 237; *1974 House Hearings, supra* note 81, at 145 (testimony of Professor Daniel Freed); Mullen, J., PRETRIAL SERVICES: AN EVALUATION OF POLICY-RELATED RESEARCH (Abt Associates, 192) (hereinafter cited as EVALUATION OF POLICY-RELATED RESEARCH).

- Service delivery to divertees tended to be comparatively more expensive than services to defendants sentenced to probation, *etc.*, due to smaller diversion caseloads and more frequent contacts.[91] In addition, diversion programs often were found to be providing services to defendants who, absent diversion, would have been processed swiftly, with little cost.[92]
- Though diversion programs generally succeeded quantitatively at job development and placement, the sorts of jobs into which divertees were placed tended to be low-level positions with no advancement potential and job retention after placement tended to be short-term.[93]
- Post program follow-up studies generally failed to substantiate the broad claims of reduced recidivism by diversion program participants when compared to other defendants never diverted.[94]
- Cost effectiveness and cost benefit claims for diversion tended to fail to include hidden costs in the diversion process and also relied on supposed indirect cost savings from diversion which were difficult or impossible to assess.[95]

Moreover, concerns were expressed that in the interest of flexibility, diversion often violated basic due process rights of defendants and failed to give due weight to other constitutional safeguards.[96] Others maintained that given the power of the state and the nature of the choices at hand, election of the diversion option was an inherently coercive choice.[97] Further, some writers suggested that diversion typically served to provide the state with a vehicle for imposing social controls over a large number of pretrial accused who, absent diversion, would not have been so controlled.[98] These commentators saw diversion's net effect to have been the drawing of more cases into the criminal justice system and penetration of them further into the system than would otherwise have been the case.[99]

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[91] Zimring, *supra* note 85; Gorelick, *supra* note 67, at 195-196.

[92] *See* Loh, *supra* note 29, at 835; Abt Report, *supra* note 10, at 29; Gorelick, *supra* note 67, at 195; Cressy and McDermott, *supra* note 22, at 52; Jacobson and Marshall, *supra* note, 29, at 6.

[93] *See* Abt Report, *supra* note 10, at 184; Rovner-Pieczenik, *supra* note 80.

[94] *See* Zimring, *supra* note 85, at 227-235; *1974 House Hearings*, *supra* note 81, at 147 (testimony of Professor Daniel Freed); Rovner-Pieczenick, EXECUTIVE SUMMARY, *supra* note 80 at 6; EVALUATION OF POLICY-RELATED RESEARCH, *supra* note 90, at 36.

[95] *See* Gorelick, *supra* note 67, at 194; Rovner-Pieczenick, EXECUTIVE SUMMARY *supra* note 80, at 6-7; EVALUATION OF POLICY-RELATED RESEARCH, *supra* note 90, at 30.

[96] *See* Jacobson and Marshall, *supra* note 29, at 3-5. *See generally* Goldberg, N., *Pretrial Diversion: Bilk or Bargain?*, 31 NLADA Briefcase 6 (1973).

[97] *See* NAC COURTS REPORT, *supra* note 1, at 34; Jacobson and Marshall, *supra* note 29, at 4; Nejelski, *supra* note 86, at 404-405; Nimmer, *supra* note 55, at 34.

[98] *See* Gorelick; *supra* note 67, at 197; Cressy and McDermott, *supra* note 22; *1974 House Hearings*, *supra* note 81, at 30 (testimony of Associate Deputy Attorney-General Gary Baise).

[99] *See* Nimmer, *supra* note 55, at 49; Gorelick, *supra* note 67, at 194-200; Nejelski, *supra* note 86, at 397.

Many of these and similar objections which have surfaced in recent years are really criticisms of the way in which diversion has been oversold, not challenges to the fundamental soundness of the concept itself. This is an important distinction which diversion's critics often fail to make and which its advocates have been slow to bring into focus. In addition, where genuine criticisms of the effectiveness of diversion in practice have been made—such as challenges to particular claims of cost effectiveness or reduced recidivism—these have arisen in the context of particular local diversion programs.[100] While it is doubtless true that some individual diversion efforts in various locales have been operated inefficiently or have failed to meet their stated goals, it by no means follows that such failings are inherent in the operation of diversion programs generally or, for that matter, that such examples are typical.[101] As is the case with virtually every area of human endeavor, the quality and effectiveness of individual diversion programs run the scale from poor to good, depending on a host of localized variables and too often on the strengths and weaknesses of the personalities involved. Pretrial diversion would not have been so beset by criticism if it had not been cast in the role of a panacea during its first years.

Perhaps the greatest harm done by the early, unsophisticated over-selling of diversion was the creation by its advocates of the misimpression that diversion could result in comparative improvements in *all* departments of justice administration simultaneously. As with any other process or system, numerous complementary potential benefits can be realized from diversion—on paper. In actual operation, budgetary constraints and differing local priorities and pressures will result in inevitable trade-offs. For example, criminal justice systems which are sensitive to the potential abuses of defendants' rights inherent in pretrial diversion will develop and attach to diversion procedural safeguards similar to those guaranteed by the adversary process. This phenomenon will inevitably encumber the diversion process, the net effect being the expenditure of more man-hours and the occurence of more courtroom appearances or administrative hearings.[102]

To take another example, particular diversion programs which faithfully attempt to avoid the criticism that such programs only enroll "boy scouts and virgins" who are "predestined to succeed"[103] will inevitably increase the cost per case when servicing higher risk or more disadvantaged defendants: more staff hours must be expended in counseling,

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[100] Kirby, *supra* note 85, at 8-10.

[101] Kirby, *supra* note 85, at 29; Zimring, *supra* note 85, at 241.

[102] *1974 House Hearings*, *supra* note 55, at 157 (testimony of Professor Daniel J. Freed); Nejelski, *supra* note 86, at 404.

[103] Keynote Address by Professor Norvall Morris, Dean, University of Chicago Law School, to the 1975 National Conference on Pretrial Release and Diversion, April 14, 1975, *in* FINAL REPORT, 1975 NATIONAL CONFERENCE ON PRETRIAL RELEASE AND DIVERSION, 20 (NAPSA, National Center for State Courts, and ABA PTI Service Center, October, 1975) (hereinafter cited as Morris Address).

outreach and service delivery with such a clientele. The length of diversion participation may well be longer for such chronic cases—it typically is for diverted drug abusers, for instance[104]—thereby reducing the rate of case turnover for the program and making it less cost effective.[105] Despite the potential benefits to all parties to be derived from the successful diversion of difficult cases the percentage of unsuccessful terminations can be expected to be much higher too. This leads to more administrative proceedings at outtake and, in many instances, to a return to court for renewed prosecution.[106]

The conclusion, therefore, is that while potential benefits to be derived from pretrial diversion exist in all departments, in actual practice, system and cost constraints dictate that some of these must be subordinated or, perhaps, even sacrificed. As long as formulation of a diversion mechanism is not conducted in a vacuum but in the context of system-wide criminal justice planning and budgetary analysis, the inevitable trade-offs can be identified in advance and taken into account. If the planned diversion program is truly to be an asset to the local criminal justice process, then consensus on program design, though perhaps harder to achieve, will nevertheless occur and will not degenerate into criticism and opposition once operations begin. Only by following such an open planning process will diversion proponents avoid the simplistic over-promising in proposals and grant applications which characterized the first decade of new program starts and which, since then, has generated most of the criticisms referred to above.

Even when certain of the above objections have some validity, there are substantial reasons for continuing to utilize pretrial diversion. It must be remembered that diversion is a strategy designed to offer non-punitive case processing to selected individuals charged with crime. Punishment as the main thrust of the criminal law has, over the years, failed to demonstrate that it acts as a deterrent or that it succeeds in reducing recidivism.[107] Indeterminate sentencing and other strategies advanced by the

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[104] The standard term of "treatment" in drug diversion programs and under drug diversion statutes is generally in excess of six months, sometimes a year or more. Watkins, A., COST ANALYSIS OF CORRECTIONAL STANDARDS: PRETRIAL DIVERSION, VOLUME II 31, 41-44 (LEAA, 1975) (hereinafter cited as Watkins). *See, e.g.*, §404(b)(1) of the federal CSA (authorizes a maximum treatment referral of one year); N.J.S.A. 24: 21-27 (§27 of which authorizes drug diversion for up to one year); ANNUAL REVIEW OF OPERATIONS, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA FOR 1974, at 56-57 (standard diversion term in non-statutory Narcotics Diversion Project is 10 months).

[105] Comparative *per capita* cost of operations is higher for drug diversion programs than for non-drug models such as the DOL-manpower programs in part due to slower case turnover, but also due to more comprehensive and intensive service delivery mandates. Watkins, *supra* note 104, at 41-44.

[106] *See* 1974 House Hearings, *supra* note 81, at 157 (testimony of Professor Daniel Freed).

[107] Lipton, D., Martinson, R., and Wilks, J., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT (Praeger, 1975); Martinson, R., *What Works—Questions and Answers About Prison Reform*, 35 PUBLIC INTEREST 22-54 (1974).

medical-model advocates of the rehabilitationist school have also demonstrated disappointing results.[108]

Diversion, in contrast, is premised not on punishment nor on treatment for illness but on the conscious policy decision of criminal justice administrators that the reach of the criminal law is over-broad; that because it is over-broad, certain types of persons are drawn into the criminal justice system for whom punishment is recognized as inappropriate and over-reactive yet treatment or rehabilitation in a medical or psychiatric sense is also inapposite. Criminal justice policymakers reasonably conclude that while cases and defendants which fall into this category are not so minor as to warrant immediate screening out without some formal response to the underlying conduct, nevertheless, trial, conviction and sentencing are a costly and time consuming over-response. Pretrial diversion, in contrast, offers an intermediate level of response and sanction consistent with minimizing penetration into a criminal justice system which is itself regarded as criminogenic.[109] The criminal justice system in this situation makes a calculated decision to take a chance on such intermediate cases where little is to be gained from full prosecution; it is hoped that by diverting certain cases, subject to certain conditions and limitations on behavior, comparative improvements will occur in the quality of the defendants' lives which will result in fewer rearrests and more socially acceptable and productive activity.[110]

It is true that diversion is no panacea to the administrative problems faced by over-burdened courts. While diversion does not—cannot—offer the ultimate solution to case backlogs because it is by its very nature a selective process, it can result in comparative caseload reduction. It is the responsibility of criminal justice planners and administrators to insure that the vacuum created by the diversion of one group of cases is not filled by more arrests and/or more prosecutions of other categories of cases.[111] Further, it is the affirmative responsibility of these actors to insure that prosecution and court resources that are freed by widespread use of diversion are effectively redirected toward the processing of more serious cases; this sort of redirection will not necessarily come about automatically.[112]

While it is now apparent that, in most jurisdictions, pretrial diversion is an alternative to probation and to other sorts of post-conviction community corrections rather than to incarceration, it is not true that no comparative advantages exist in favor of the use of early diversion. While the

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[108] *See generally*, McGee, R., A New Look At Sentencing, Parts I & II, 38 FEDERAL PROBATION 2:3-8, 3:3-11 (1974); Morris, N., THE FUTURE OF IMPRISONMENT (Univ. of Chicago Press, 1974).

[109] Nimmer, *supra* note 99, at 45; NAC CORRECTIONS REPORT, *supra* note 2, at 76; *1974 House Hearings*, *supra* note 81, at 60 (testimony of Genesee County District Attorney Robert F. Leonard).

[110] Specter, A., Diversion of Persons from the Criminal Process to Treatment Alternatives, 44 PA. BAR ASS'N Q. 691 (1973), *reprinted in* SOURCE BOOK, *supra* note 9, at 16-21. *See generally* Vera Report, *supra* note 6; Vorenberg, *supra* note 2.

[111] Nejelski, *supra* note 86, at 397; Gorelick, *supra* note 67, at 195-196.

[112] Morris Address, *supra* note 103, at 19-22.

cost per case of servicing and supervising divertees may well be higher than that for probation due to comparative volume and caseload size, substantial cost and manpower savings to prosecution and court support staff may be realized. Such savings shift cost effectiveness considerations back in the favor of diversion.[113]

Further, even for divertees with prior conviction records, stigma attaches with a criminal conviction.[114] Especially with the current state of the economy and the job market, persons with any or comparatively long criminal records are at a distinct disadvantage when trying to find or retain employment.[115] In addition, jeopardy arises from repeated convictions in that defendants who already have prior conviction records may find themselves subject to repeat offender statutes replete with more severe mandatory penalties if they face regular prosecution rather than choose diversion.[116] For persons charged with felonies—even if they are first offenders—conviction can lead to loss of basic civil rights.[117] Access by such defendants to pretrial diversion may be their only avenue to avoid such serious consequences.[118]

It is also apparent that the claims of drastically reduced recidivism rates which were advanced in earlier years by diversion proponents were overstated.[119] Nevertheless, no study to date has shown that comparative recidivism rates have increased from the use of diversion, and some well-structured recent evaluations show a modest reduction that can be ascribed to diversion intervention.[120] If diversion is a desirable intermediate level of response to certain cases, a response that is more humane and not unduly costly, then the question of comparative recidivism rates should assume a more reasonable stature as only one of many trade-offs to be made when deciding when to implement or continue diversion.

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[113] This is suggested for example, in NAC COURTS REPORT, *supra* note 1, at 28-30; Nejelski, *supra* note 86, at 403-404; Watkins M., COST ANALYSIS OF CORRECTIONAL STANDARDS: PRETRIAL DIVERSION, VOLUME II, 20-29 (LEAA, 1975).

[114] *See generally* Hunt, J., Bowers, J., & Miller, N., LAWS, LICENSES AND THE OFFENDER'S RIGHT TO WORK: A STUDY OF STATE LAWS RESTRICTING THE OCCUPATIONAL LICENSING OF FORMER OFFENDERS (ABA National Clearinghouse on Offender Employment Restrictions, 1974); Miller, H., THE CLOSED DOOR: THE EFFECT OF A CRIMINAL CONVICTION ON EMPLOYMENT WITH STATE AND LOCAL PUBLIC AGENCIES (Georgetown University, 1972); Portnoy, B., *Employment of Former Criminals*, 55 CORNELL L. REV. 306 (1970); Grant, W., *et al., The Collateral Consequences of A Criminal Conviction*, 23 VANDERBILT L. REV. No. 5 1002 (1970) (hereinafter cited as Grant).

[115] *See* Tropp, R. *Suggested Policy Initiatives for Employment and Crime Problems, in* CRIME AND EMPLOYMENT PROBLEMS, 27-33 (Leiberg, L., ed.) (American University Law School, Institute for Advanced Studies in Justice, 1978).

[116] Grant, *supra* note 114.

[117] *See generally* Grant, supra note 114.

[118] S. REP. No. 417, 93d Cong., 1st Sess. (1973) at 12 (remarks of Genesee County Prosecutor Robert F. Leonard); Abt Report, *supra* note 10, at 18.

[119] *See* note 94, *supra*.

[120] *See e.g.* Pryor, D., Pluma, W., and Smith, J., *Pretrial Diversion Program in Monroe County, NY: An Evaluation of Program Impact and Cost Effectiveness, in* PRETRIAL SERVICES ANNUAL JOURNAL 68, 71, 79-80 (Pretrial Services Resource Center, 1978); Kirby, *supra* note 85, at 16-18.

The very legitimate concerns being expressed about the potentially coercive aspects of diversion and the specter of social control are not without available remedies. Provided pretrial diversion is conducted as these Standards recommend—as a post-charging intervention wherein defense counsel plays an active role—then any inherent coerciveness and possible disregard for defendants' rights are minimized.

D. Goals

Final resolution of many of these concerns is beyond the ability of these Standards to achieve. Rather, local diversion advocates and practitioners must be mindful of the potential problems and inevitable trade-offs that will arise in the course of diversion operations. These Standards are intended to provide guidance and direction when working toward resolution of such inherent problems. Notwithstanding the continued existence of these tensions and concerns, there seems to be a broad consensus among criminal justice system actors of the goals pretrial diversion should be striving to achieve. These are as follows:

- Pretrial diversion should provide the traditional criminal justice system with greater flexibility and enable the system to conserve its limited resources for cases more appropriately channelled through the adversary process;
- Pretrial diversion should provide eligible defendants with a dispositional alternative that avoids the consequences of regular criminal processing and possible conviction, yet insures that defendants' basic legal rights are safeguarded;
- Pretrial diversion should advance the legitimate societal need to deter and reduce crime by impacting on arrest-provoking behavior by offering participants opportunities for self development; and
- Pretrial diversion should achieve the aforementioned goals in the most efficient, economical and non-duplicative manner possible.

E. Conclusion

While these Goals and Standards attempt to propose an ideal configuration against which local practices should be measured, it is recognized that many pretrial diversion efforts do not typify all the recommended features. Indeed, though there exists a general consensus among pretrial diversion practitioners concerning major goals of diversion and many aspects of diversion program design, nevertheless, with regard to many of the points recommended, some program administrators and criminal justice policymakers can be expected to differ. It is for this reason that these Standards and Goals are being advanced. Pretrial diversion, no longer in its infancy, remains a discipline in search of a philosophy.[121] The players are there, but the theme has been obscured in the process.[122]

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[121] *See generally* Vorenberg, *supra* note 2. *See also* Gorelick, *supra* note 67, at 200-203.

[122] *See* Nejelski, *supra* note 86, at 406-410; Morris Address, *supra* note 103, at 18-23.

What is recommended in these Standards and Goals demonstrates a philosophical consistency and comports with diversion practices and attitudes which appear to be the most defensible, taking into consideration the competing interests diversion is expected to serve. The advocacy of certain practices and features reflects the historical prominence of the DOL manpower model of community-based program, as more recently proliferated with minor variations under LEAA sponsorship.[123] This early predominance in the field of what some now term the traditional model itself came about because of the widely-regarded success of this general approach.[124] After a decade of experimentation and evolution, the basic configuration of these early programs has stood the test of time. Most of the problems encountered by these early ventures in pretrial diversion, and many of the responses to those problems which have proved durable, are viewed as generally applicable to the implementation of pretrial diversion everywhere. Hence, these Standards can be said to advocate an ideal.

At the same time, while the Standards suggest an ideal, they do not attempt to be idealistic. Alternatives to or within the criminal justice system should exist according to a deliberate, rational plan, each complementing the other. It is only in this way that the criminal justice system can focus selectively on those cases in which use of such alternatives as diversion seems appropriate. As a practical matter, each alternative should function to accomplish its own well-defined objectives. Those objectives in turn should be measurable and measured. Finally, continuation of diversion, as continuance of any single approach, should be permitted only if these objectives are being met.

In reality, such judgments and measurements are difficult to make. The impact of particular practices on human life, on that of the defendant as well as on that of the victim, is hard to gauge. Political and other considerations necessarily interfere with and warp these judgments and measurements. Nevertheless, the various points advanced in these Standards should help practitioners as well as policymakers in the diversion field evaluate their current practices and the directions they wish to take. At the very least, the Standards should lead to a reexamination of basic considerations such as possible violations of defendants' rights, widening the net of social controls, accountability for decisions, cost effectiveness of programs, and achievement of stated objectives.

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[123] *See generally* Bellassai, *supra* note 10.

[124] NAC COURTS REPORT, *supra* note 1, at 37-38; Rovner-Piaczenik, EXECUTIVE SUMMARY, *supra* note 80, at 10-11.

STANDARDS

1.1 Potential Divertees Should Be Eligible For Pretrial Diversion From The Time Of The Filing Of Formal Charges Until The Time Of Final Adjudication. They Should Not Enroll In Such Programs Unless They Have Had The Opportunity To Consult With Counsel.
1.2 The Pretrial Diversion Option Should Be Presented Only After An Initial Determination Has Been Made By The Court That The Defendant Will Be Released Pretrial.
1.3 A Defendant's Decision To Enroll In A Pretrial Diversion Program Should Be Voluntary.
1.4 The Possibility Of Enrolling In A Pretrial Diversion Program Should Not Preclude A Defendant From Considering And Pursuing Other Strategies Which May Be More Advantageous To Him Than The Diversion Option.

STANDARD 1.1 Potential Divertees Should Be Eligible For Pretrial Diversion From The Time Of The Filing Of Formal Charges Until The Time Of Final Adjudication. They Should Not Enroll In Such Programs Unless They Have Had The Opportunity To Consult With Counsel.

COMMENTARY

Criminal justice systems operate differently from one jurisdiction to the next. Consequently, the exact point at which a defendant becomes eligible for pretrial diversion varies.[1] These Standards take the position that

[1] *See generally* American Bar Association Pretrial Intervention Service Center, Directory of Criminal Justice Diversion Programs, 1976 (Washington, D.C. 1977) (hereinafter cited as 1976 ABA PTI Directory). Of the 148 programs listed in the PTI Directory's 1976 Edition, 74 (50%) diverted some of the time or all of the time at a point in the processing of the criminal case which is *prior to* arraignment. (Identified points of diversion for programs listed included the pre-arrest, post-arrest, pre-charge, post-charge, pre-arraignment, arraignment, post-arraignment, pre-indictment, and pre-adjudication phases.)

For a discussion of the procedural variations at the point of intake as between several well-known pretrial diversion programs, *see* Mullen, J., the Dilemma of Diversion: Resource Materials on Adult Pretrial Intervention Programs 5-19, 76-79 (LEAA, 1974) (hereinafter cited as Mullen) and National Advisory Commission on Criminal Justice Standards and Goals, REPORT ON CORRECTIONS (1973) at 124-128 (various juvenile diversion models compared) (hereinafter cited as NAC CORRECTIONS REPORT).

eligibility for enrollment in a pretrial diversion program should occur only subsequent to the filing of formal charges and only after the potential divertee has had access to counsel. Eligibility should end at the time guilt is finally adjudicated.[2]

While these Standards recognize that pretrial diversion is offered as a cost saving, time saving, non-duplicative process and therefore should occur as soon as possible after arrest, nevertheless, pretrial diversion enrollment prior to formal filing of charges is viewed as premature and generally inconsistent with the requirements for voluntariness contained in this Standard. The post-charging stage in the proceedings has been purposely selected as the earliest recommended point for diversion eligibility determination because it is only at this point that the government has

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[2] According to the Report of the National Advisory Commission on Criminal Justice Standards Goals,

> [a]ction taken after conviction is not diversion because at that point the criminal prosecution already has been permitted to proceed to its conclusion, the determination of criminal guilt.
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> If diversion programs were made available as sentencing alternatives, the objective of avoiding the stigma of a criminal conviction would be nullfied.
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> . . . . . .
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> No matter what efforts are made to expedite the [criminal justice] process, requiring conviction before referral to such programs would delay significantly an offender's entry into them.

National Advisory Commission on Criminal Justice Standards and Goals, REPORT ON COURTS, 27, 28 (1973) (hereinafter cited as NAC COURTS REPORT).

These Standards generally concur with the NAC REPORT in this regard. (See Standard 2.3, *infra*, and accompanying text.) However, to be more precise on this point, it is the position of these Standards that it is *final* adjudication of guilt which is the absolute end point in the processing of a criminal case beyond which diversion cannot and should not occur, not *conditional* adjudication. While the practice is not a recommended one, it must be acknowledged that a small minority of otherwise orthodox diversion programs and statutes require the entry of a conditional plea of guilty on the record at or before enrollment which, if diversion requirements are satisfied, may thereafter be withdrawn or expunged, to be followed by a dropping of charges. This practice, in those few instances where utilized, tends to be applied to drug-dependent defendants. *See*, for example, §404(b)(1) of the Federal Controlled Substances Act of 1970, Pub. L. 91-513, 21 U.S.C. §844(b)(1)(1970); ANNUAL REPORT OF OPERATIONS, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, for 1975, (description of conditional guilty plea procedure employed by non-statutory drug diversion program); and Abt Associates, Inc., REPORT ON OPERATION OF PROJECT INTERCEPT, 1-12 (1971) (description of conditional guilty plea employed by DOL-model *non*-addict diversion program in San Francisco Bay area of California during its pilot phase).

filed legal documents indicating its intention to prosecute.[3] The requirement that formal charges be filed prior to an eligibility determination minimizes the likelihood that individuals whose cases lack sufficient merit to support the filing of a simple information by the prosecutor will be diverted.[4] It is axiomatic that if non-meritorious cases should not be prosecuted, they also should not be funneled into the diversion process.[5] In addition, this approach eliminates from diversion consideration those

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[3] That the formal decision as to which charges an arrested defendant will be tried on rests with the prosecutor, as attorney for the government, rather than the police is a general feature of criminal justice in the United States and has met with almost universal endorsement by commentators. For example, the National Advisory Commission on criminal Justice Standards and Goals recommends that,

> [t]he decision to charge . . . should . . . be made by the prosecutor or a member of his staff. Although a police officer should have the authority to arrest and book a person suspected of a serious offense without prior prosecutorial approval, the process should go no further than that without formal involvement of the prosecutor's office.

NAC COURTS REPORT, *supra* note 2, at 25. *See also* Presidents Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: THE COURTS 5 (1967); American Bar Association Project on Standards for Criminal Justice, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Prosecution Function Standard 3.4(a) and accompanying commentary at 84-86 (Approved Draft, 1971) (March, 1971, ed.) (hereinafter cited as ABA Prosecution and Defense Function Standards).

[4] *See* NAC COURTS REPORT, *supra* note 2, at 30, 33-34. As a team of recent commentators has aptly called for in this regard,

> [t]here is a need for procedures to draw a clearer line between screening, which involves no further control over the defendant, and Pretrial intervention, which entails an evaluation of the defendant's performance during the period of suspension of proceedings. To reduce the imposition of pretrial intervention upon unnecessary cases, we urge consideration for a requirement of prosecutor certification that the case selected for a pretrial intervention program is one that is likely to proceed further through the criminal justice process but for the pretrial intervention program.
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> . . . Pretrial intervention programs should be required to demonstrate that:
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> - Screening out of the criminal justice system is inappropriate for the types of cases considered eligible under the intervention program's guidelines.
> - Safeguards have been devised to insure that only prosecutable cases are considered for pretrial intervention.

Aaronson, D., *et al.*, THE NEW JUSTICE: Alternatives to Conventional Adjudication, 33 (LEAA, 1977) (hereinafter cited as New Justice).

[5] NAC COURTS REPORT, *supra* note 4, at 30, and *as per* Standard 2.1, "General Criteria for Diversion", at 32; NEW JUSTICE, *supra* note 4.

cases for which the evidence would support formal charges but where, due to the minor nature of the charge or extenuating circumstances, the prosecutor would decline to prosecute.[6]

Requiring the filing of formal charges prior to diversion eligibility is essential so that the choice on the part of the defendant to be diverted is truly an informed one and, in that sense, voluntary.[7] An accused, in order to make such an informed choice, must be aware of the actual charge(s) he faces and the potential consequences of prosecution if he does not opt for pretrial diversion. It is only after formal filing that a defendant has

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[6] *See* NAC COURTS REPORT, *supra* note 2, at 24-26. *See also Rodriquez* v. *Rosenblatt*, 58 N.J. 281 (1971) and *Guidelines for the Operation of Pretrial Intervention in New Jersey* 9 (Supreme Court of New Jersey, Sept. 8, 1976), (hereinafter cited as *N.J. PTI Guidelines*). Both *Rodriquez* and Guideline 3(d) affirm the exclusion of ordinance, health code and similar minor infractions from pretrial diversion eligibility on the theory that to divert such would result in overreach and increased penetration into the criminal justice system for these sorts of cases, which normally result in a fine or suspended sentence.

Other commentators have noted that the use of pretrial diversion should not be a substitute for but rather a supplement to a prosecutor's pretrial screening process. They have stressed, for example, that "those [prosecutor's] offices that are not screening cases prior to filing are suffering from the effects of dumping garbage into the criminal justice system" and that "[d]iversion is the *final* strategy available to the prosecutor in the implementation of his [pretrial screening] policy" because "[d]iversion has been . . . identified as a disposition." (Emphasis added.) Jacoby, J., NATIONAL EVALUATION PROGRAM PHASE I REPORT: PRETRIAL SCREENING IN PERSPECTIVE 54, 26 (LEAA, 1976) hereinafter cited as Jacoby). Similarly, it has been aptly noted that

> [g]iven a criminal justice system that has insufficient resources to prosecute every violator of the criminal laws, the prosecutor is obliged to balance his obligation to represent the public's interest in law enforcement against the necessity to screen some offenders out of the prosecutorial process. Thus, he may welcome pretrial diversion as an intermediate option between costly, full-scale prosecution and no intervention at all. But pretrial diversion is justifiable only if it results in an allocation of resources that is more likely than the traditional two-option system to achieve the goals underlying the criminal laws: deterrence, retribution, rehabilitation, and protection of the public safety.

Thomas, C., and Fitch, W., *Prosecutorial Decision-Making*, 13 Amer. Crim. L. Rev. 507, 532 (1976) (hereinafter cited as Thomas & Fitch).

[7] *See* NAC COURTS REPORT, *supra* note 2, Standard 2.2, "Procedure for Diversion", and Commentary thereto, at 39-40; ABA Pretrial Intervention Service Center, PRETRIAL INTERVENTION LEGAL ISSUES: A GUIDE TO POLICY DEVELOPMENT, 12 (Washington, DC, 1977) (hereinafter cited as PRETRIAL INTERVENTION LEGAL ISSUES); Jaszi, P., and Pearlman, H., LEGAL ISSUES IN ADDICT DIVERSION: A TECHNICAL ANALYSIS, 84-85 (Drug Abuse Council, Inc. and ABA Corrections Commission, 1975) (hereinafter cited as Jaszi & Pearlman).

definite knowledge of the charge(s) for which he will stand trial. These charges may or may not be identical to the initial police charge(s).[8]

Although these Standards take the position that filing of formal charges is the earliest point at which pretrial diversion should take place, given the voluntariness considerations outlined here, it has been argued by some that even this point is too early, that there exists a constitutional requirement for a judicial finding of probable cause before a defendant can be diverted.[9] In the recent case of *Gerstein* v. *Pugh*,[10] the United States Supreme Court held that the Fourth Amendment requires a judicial determination of probable cause ". . . as a pre-requisite to extended restraint of liberty following arrest."[11] Though *Gerstein* involved a defendant held in pretrial detention, the Court added that ". . . even pretrial release can be accompanied by burdensome conditions that effect a significant restraint of liberty."[12] As one commentator has pointed out with regard to *Gerstein*, "[t]he implications for pretrial intervention programs are apparent. If pretrial release conditions can amount to significant restraints of liberty

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[8] Though the initial charging decision normally is a police function incident to making an arrest, the decision as to which charges—for reasons of public policy, sufficiency of the evidence, and trial strategy—should be formally filed is a function of the prosecutor. *U.S.* v. *Shaw*, 226 A.2d 336 (D.C. App. 1967)." On the District Attorney rests the responsibility to determine whether to prosecute, when to prosecute, and on what charges to prosecute." *Id.* at 368. *See also District of Columbia* v. *Buckley*, 128 F.2d 17 (D.C. Cir.) *cert. denied*, 317 U.S. 658 (1942) (prosecutor decides how many charges are to be filed); *Deutsch* v. *Adenhold*, 80 F.2d 677 (5th Cir. 1935) (U.S. Attorney decides under which applicable Statute he will prosecute, and is not bound by charging decision of arresting officer); *Kennedy* v. *Rabinowitz*, 318 F.2d 181 (D.C. Cir. 1963), *aff'd*, 376 U.S. 605 (1964) (duty of U.S. Attorney General to enforce laws implies authority to construe individual statutes and decide under which to proceed with prosecution).

This view, that it is the prosecutor's perogative to decide the number and nature of formal charges to be filed and the statute(s) under which to proceed with prosecution, has been widely commented upon and endorsed. *See, e.g.*, ABA Prosecution Function Standards, *supra* note 3, Standard 3.9, "Discretion in the charging Decision", and commentary thereto at 92-98; National District Attorneys' Association, PHILOSOPHICAL, PROCEDURAL AND LEGAL ISSUES INHERENT IN PROSECUTOR DIVERSIONARY PROGRAMS, 3-6 (Chicago, 1974) (hereinafter cited as NDAA Monograph); Bubany, C., and Skillern, F., *Taming the Dragon: An Administrative Law for Prosecution Decision-Making*, 13 Amer. Crim. L. Rev. 473, 480-481 (1976) (hereinafter cited as Bubany & Skillern); Jacoby, *supra* note 6, at 7-16.

The defendant's need to have definite knowledge of the charges that, first of all, are formally filed (as opposed to police charges) and, second, that will go forward to trial (as opposed to being dropped after filing by the prosecutor, for a variety of reasons) is vital information without which a decision to opt for diversion cannot be considered truly knowing or truly voluntary. Police and prosecutor over-charging to gain leverage for eventual plea bargaining is too well documented and studied a phenomenon to require further elaboration. *See* ABA Prosecution Standards, *supra* note 3, Standard 3.9(e) and commentary thereto, at 98; Bubany & Skillern, *supra*, at 480-483; LaFave, *The Prosecutor's Discretion in the United States*, 18 Amer. J. Comp. L. 532, 541 (1972) (hereinafter cited as LaFave).

[9] *See* PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 7, at 20-21; NOTE, *Pretrial Diversion from the Criminal Process: Some Constitutional Considerations*, 50 Ind. L. Rev. 783, (1975). *See also* American Law Institute, *Model Code of Pre-Arraignment Procedure* §320.5 (Tentative Draft No. 5, 1972) (hereinafter cited as *ALI Model Code*).

[10] 420 U.S. 103 (1975).

[11] *Id.* at 105.

[12] *Id.* at 114.

necessitating judicial findings of probable cause, then depending on the particular conditions of the diversion program, consent to diversion may require a prior judicial hearing to determine probable cause."[13]

While this argument is persuasive, it is also arguable that the *Gerstein* situation is distinguishable from the usual pretrial diversion situation. The Court in *Gerstein* mandates a probable cause hearing prior to pretrial confinement and in strong *dicta* suggests that this hearing may be necessary prior to pretrial release on conditions significantly restraining liberty.[14] In this regard it is clear that the court in *Gerstein* is focusing on the situation where the bond-setting magistrate imposes either confinement or burdensome conditions on a defendant. Many would argue that pretrial diversion is not imposed on defendants. They would maintain that as long as the eligibility determination and intake procedures provide for a knowing choice by the potential divertee of the diversion option over the other avenues available, then the *Gerstein* mandate of a probable cause judicial hearing is obviated.[15] It must be remembered that courts have yet to grapple with the contention advanced by others that regardless of procedural safeguards, diversion is inherently coercive, given the range of choices confronting the defendant.[16] If courts in the future should find some or all diversion procedures coercive *per se*, then moving diversion eligibility determination back in time subsequent to a judicial determination of probable cause would be constitutionally mandated.[17]

Assuming *arguendo* that a probable cause hearing is required before pretrial diversion occurs, then formal filing would necessarily also be required prior to the accused's opting for diversion.[18] As the commentator goes on to point out,

> *Gerstein* also appears to have an incidental impact on pre-charge diversion programs. It is apparent that the issue of probable cause to arrest for a crime cannot be adequately resolved without a formal, specific charge. Thus, assuming *Gerstein* applies to diversion programs (and the language in the

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[13] PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 7, at 20. *See also* Maron, N., *Constitutional Problems of Diversion of Juvenile Delinquents*, 51 Notre Dame Lawyer 22, 44 (1975).

[14] *Ibid.*

[15] NAC COURTS REPORT, *supra* note 2, Standard 2.2, "Procedure for Diversion Programs", and Commentary thereto, at 39-40; NDAA Monograph, *supra* note 8, at 7-8; Thomas & Fitch, *supra* note 6, at 542.

[16] NAC COURTS REPORT, *supra* note 2, at 27, 29, 34; Nimmer, R., TWO MILLION UNNECESSARY ARRESTS 14 (American Bar Foundation, 1971); Jacobson, H., and Marshall, J., *Defender operated Diversion—Meeting Requirements of the Defense Function*, NLADA BRIEFCASE, Vol. XXIII, no. 1 (June 1975) *reprinted as* ABA Pretrial Intervention Article Reprints No. 4 (Sept. 1975) at 4-5 (hereinafter cited as Jacobson & Marshall).

[17] For a thorough discussion of this point, *see* Loh, W., *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827, (1974); Note, *Pretrial Diversion from the Criminal Process: Some Constitutional Considerations*, 50 Ind. L. Rev. 783, and Goldberg, N., *Pretrial Diversion: Bilk or Bargain?*, 31 NLADA BRIEFCASE 6, (1973).

[18] NOTE, *Pretrial Diversion from the Criminal Process: Some Constitutional Considerations*, 50 Ind. L. Rev. 783, 795 (1975).

decision relating to pretrial release conditions seems to indicate that it does), the case further suggests that formal charging is a constitutional requirement of any diversion procedure.[19]

This Standard also mandates that the pretrial accused have access to legal counsel prior to the point at which he opts for diversion. Though various commentators have persuasively argued in the affirmative,[20] the courts have yet to decide whether the point of diversion eligibility consideration *per se* is a critical stage in the prosecution of a criminal case such that access to defense counsel is constitutionally required. For post-charge diversion programs, however, recent Supreme Court decisions leave little doubt that assistance of counsel is constitutionally required at or prior to the point at which diversion eligibility is determined. In the recent case of *Kirby* v. *Illinois*,[21] the Court stated that "... filing of formal charges, preliminary hearing, indictment, information or arraignment ..." are, whichever first occurs, the "... starting point for our whole system of adversary criminal justice ... [and] it is only then that the Government has committed itself to prosecute."[22] In the subsequent case of *United States* v. *Ash*,[23] the Court expanded its definition of which events in the prosecution of a criminal case are critical stages mandating access to counsel. The majority of the Court agreed upon two vital interests served by counsel in pretrial proceedings—assisting the defendant in understanding complex legal issues and protecting the accused against overreach by the prosecutor.[24]

Reading *Kirby* and *Ash* together, it seems certain that post-charge diversion requires assistance of counsel at the diversion decision-making stage. As one commentator has noted:

> [T]he *Kirby* demarcation would include within a 'criminal prosecution' all diversion-related activities occurring after formal charges are filed. Thus, in programs where the decision to divert is made after formal charging, the accused has the right to assistance of counsel.
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> Assuming that some activities in the diversion context occur after initiation of a 'criminal prosecution', . . *Ash* requires consideration of whether an activity represents a 'critical stage' and thus requires the presence of counsel. . . . the critical stage' of a prosecution was limited to 'trial-like confrontations' in which the interests served by the Sixth Amendment are in jeopardy.

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[19] PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 7, at 21.

[20] National Study Commission on Defense Services, DRAFT REPORT AND GUIDELINES FOR THE DEFENSE OF ELIGIBLE PERSONS, Vol. II at 1002-1004 (NLADA, 1976); PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 7, at 25; Jacobson & Marshall, *supra* note 16, at 4-5; NEW JUSTICE, *supra* note 4, at 27.

[21] 406 U.S. 682 (1972).

[22] *Id.* at 689.

[23] 413 U.S. 300 (1973).

[24] *Id.*

. . . . . .

. . . In the diversion context, the decision well may preclude a trial or seriously undermine a defense should a trial occur. Thus, the effectiveness of counsel at trial is at stake in early diversion proceedings, and the opportunity for prosecutorial overreaching is a real one.[25]

Though far less certain, it has been strongly argued that a fair reading of *Kirby* would require availability of counsel at the diversion decision-making stage even for pre-charge diversion programs. Noting that many pre-charge diversion programs provide access to counsel, a recent commentator argues that:

> A strict reading of *Kirby* can support the proposition that a prosecution cannot commence under any circumstances until the intervention of the judiciary, either through the filing of formal charges or the initiation of judicial proceedings such as arraignment. If this interpretation is the correct one, many of the early identification procedures associated with diversion programs would fall outside Sixth Amendment protection. . . . On the other hand, it seems largely mechanistic to ascribe that interpretation to *Kirby*. The events which would trigger the Sixth Amendment are largely in the control of the prosecution. While it may well be that the Sixth Amendment counsel provision was not intended to be directly applicable to the investigative stage of a criminal case, it is possible that the prosecution can commit itself to prosecute and solidify its position while artificially postponing the initiation of formal charges. It is doubtful that the Court would validate such actions.
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> . . .The decision to divert will in part be based on the offense thought to have been committed by the accused. Thus the initiation of the diversion decision-making process in and of itself indicates in most cases that the 'investigatory' stage has ended and that the prosecution has 'focused' on the accused. Seen in this light, the *Kirby* requirement of 'commencement' may be met even in some pre-charge diversion programs.[26]

Further, this Standard takes the view that there is a real need for assistance of counsel at this juncture so that the accused can ponder alternative strategies when making an informed, voluntary choice to enter the pretrial diversion process.[27] Assistance of counsel is also clearly necessary when making a knowing and voluntary waiver of specific constitutional

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[25] Jaszi & Pearlman, *supra* note 7, at 86.

[26] *Id.* at 84-85.

[27] *See* ABA Prosecution and Defense Function Standards, *supra* note 3, the Defense Function Standards 5.1 "Advising the defendant", 5.2 "Control and direction of the case", and 6.1 "Duty to explore disposition without trial" and commentary thereto, at 234-240, 243-248; American Bar Association Standards Relating to Providing Defense Services, Standards 4.2 "Collateral proceedings" ("Counsel should be provided in all proceedings arising from the initiation of a criminal action against the accused. . . .") and 5.1 "Initial Provision of Counsel; notice" ("Counsel should be provided to the accused as soon as feasible after he is taken into custody, when he appears before a committing magistrate, or when he is formally charged, whichever occurs earliest") and commentary thereto, at 40-46 (Approved Draft, 1968); NEW JUSTICE, *supra* note 4, at 25-27, 33.

rights such as the right to speedy trial, the right to trial by jury, and the right to have the government prove its case beyond a reasonable doubt.[28] These and other rights are generally required to be waived upon entry into pretrial diversion.[29]

This Standard considers that final adjudication of guilt eliminates eligibility consideration for pretrial diversion. Simply put, pretrial diversion is premised on being a cost saving, time saving and less stigmatizing alternative to the traditional adversary process. Post-conviction diversion to community-based corrections *i.e.*, diversion after imposition of sentence, accomplishes none of these aims and is part of the traditional process itself. This is not to suggest that such post-conviction alternatives are not equally valid and equally needed alternatives to incarceration.

Avenues into pretrial diversion should exist at each stage prior to final adjudication, including post-preliminary hearing, post-indictment and at the conclusion of pretrial motions. Obviously, as a particular case nears the trial stage of proceedings, the cost saving and time saving advantages of offering the accused pretrial diversion lessen. It must be remembered that pretrial diversion is justifiable only for cases deserving of prosecution. Advocating continued access to diversion at each of the above mentioned points is specifically included to make diversion available to as many meritorious cases as possible. It is the position of these Standards that it is unfair to ask a defendant to waive his right to preliminary hearing and indictment in a felony case and his statutory and/or constitutional right to file and seek rulings on specific pretrial motions in order to enter pretrial diversion.[30] Further, a prosecutor, through the course of investigation, might discover facts about the crime or the defendant which

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[28] PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 7, at 20-30; NAC COURTS REPORT, *supra* note 2, at 39. Standard 2.2, "Procedure for Diversion Program Programs;" in the NAC COURTS REPORT, it should be noted, mandates that "[w]here the diversion program involves significant deprivation of the offender's liberty, diversion should be permitted only under a court-approved diversion agreement" which "[t]he court should approve . . . only if it would be approved under the applicable criteria [for knowingness and voluntariness] if it were a negotiated plea of guilty." The U.S. Supreme Court in 1970 in *Brady* v. *United States* enumerated certain standards for protection of the defendant during plea bargaining. *See Brady* v. *United States*, 397 U.S. 742 (1970).

[29] Mullen, *supra* note 1, at 12; NAC COURTS REPORT, *supra* note 4, at 29-30, 39; ABA PRETRIAL INTERVENTION SERVICE CENTER, PRETRIAL INTERVENTION SERVICES: A GUIDE FOR PROGRAM DEVELOPMENT, 46-50 (Washington, DC, 1977) (hereinafter cited as PTI Program Development Guide).

[30] As a respected team of commentators affiliated with the American University Institute for the Administration of Justice recently stressed,

> [A] problem of potentially impermissable coercion arises when participation in a . . . pretrial intervention alternative is conditioned on the waiver of rights or privileges otherwise available to defendants. Some such waivers—including limited surrender of rights of confidentiality and of the right of speedy trial—are clearly acceptable when the receipt of program benefits would be inconsistent with the full exercise of the rights involved. But compliance with constitutional principles dictates that no more be exacted from program participants by way of waiver than is necessary to make participation legally and practically possible.

NEW JUSTICE, *supra* note 4, at 25-26.

might favorably alter his view toward offering the diversion option. To terminate eligibility sooner than final adjudication of guilt would likely result in eliminating from diversion consideration cases where investigation shows that the severity of the crime allegedly committed was much less than originally thought or where extenuating or mitigating circumstances exist or where adjustment on pretrial release indicates that a heretofore seemingly unlikely candidate for pretrial diversion may in fact be suitable for diversion.

STANDARD 1.2 The Pretrial Option Should Be Presented Only After An Initial Determination Has Been Made By The Court That The Defendant Will Be Released Pretrial.

COMMENTARY

Some commentators have argued that a defendant's having to choose between enrolling in diversion or proceeding to plea negotiation or to trial is always inherently coercive.[31] Whether this is a fair conclusion with regard to defendants who are at liberty at the point of having to opt for diversion is debatable and may vary with the circumstances. Factors that would be dispositive in this regard include whether counsel has yet been appointed, whether the defendant in fact receives effective assistance of counsel and whether the prosecutor adheres to a policy of diverting only otherwise prosecutable cases, or instead, uses the diversion program as a dumping ground for cases which absent diversion would not be prosecuted.[32]

In contradistinction, where the defendant is confined at the time the diversion option is offered to him the threat of implicit government coercion may motivate him to opt for diversion (and thereby expedite release).[33] As legal aid attorneys surveying the dynamics of the diversion enrollment stage have aptly noted:

> [l]egal ramifications of a decision to accept an offer of diversion must be evaluated by a potential defendant . . . Consider an ordinary individual under arrest and faced with the filing of criminal charges, or one who has

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[31] *See, e.g.*, NEW JUSTICE, *supra* note 4, at 25; Jacobson & Marshall, *supra* note 16; Goldberg, N., *Pretrial Diversion: Bilk or Bargain?* NLADA BRIEFCASE *reprinted in* Gorelick, J., *Pretrial Diversion: the Threat of Expanding Social Control*, 10 Harvard Civ. Rts.—Civ. Lib. L. Rev. 180, 200-201, 210 (1970) (hereinafter cited as Gorelick).

[32] *See* NEW JUSTICE, *supra* note 4, at 26-27, 33; NAC COURTS REPORT, *supra* note 2, at 27, 29, 34; ALI Model Code, *supra* note 9, at §320.5.

[33] This is clearly suggested in summary narrative reports on major pretrial diversion programs which interview in cellblock, prior to the release determination. *See, e.g.*, ABT Associates, Inc., Pretrial Intervention: A PROGRAM EVALUATION OF NINE MANPOWER-BASED PRETRIAL INTERVENTION PROGRAMS, FINAL REPORT, 32 (DOL, 1974); Vera Institute of Justice, Manhattan Court Employment Protect, Summary Report on Phase One, 21-22 (1970); Jacobson & Marshall, *supra* note 16, at 3-5.

already been charged and who does not believe the charges to be warranted. Should he assert his innocence and endure the full impact of the criminal justice process, including pretrial detention?[34]

It is in order to minimize this implicit government coercion that these Standards take the position that otherwise eligible defendants not be confronted with the choice of whether to accept diversion until after the initial court appearance at which release conditions are determined.

It appears from available data that most defendants who fit typical diversion eligibility criteria, *i.e.*, those charged with relatively non-serious offenses and/or first offenders, have a comparatively better chance to obtain non-financial release or lower financial bonds than other classes of defendants.[35] This likelihood that most potential diversion candidates will obtain pretrial release on considerations apart from the fact of their diversion eligibility is in and of itself a good reason to locate diversion at the post-release stage. All participants in the diversion decision-making process—the defendant, the prosecutor, the court and the diversion program—benefit from a procedure by which the participant's opting for diversion is as free a choice as possible given the range of alternatives available. The decision should not be tainted by the specter of fear of pretrial confinement *in lieu* of diversion. While it is statistically true that a potential divertee is apt to be released pretrial, the individual involved seldom is in a position to know the odds involved and, even if he does, there is no guarantee that the bond set will be such as to lead to his release. Choosing the "sure thing" of diversion over the possibility of pretrial confinement may be an overpowering temptation.[36]

Because in many jurisdictions the release decision is made at the arraignment/presentment stage, counsel will be appointed or retained at that time, thus offering the accused greater assistance in reaching a decision on whether or not to choose pretrial diversion. While these Standards take the view that as a general proposition, the diversion enrollment decision should take place after the pretrial release decision and that there is a presumption that those who opt for diversion while confined do so

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[34] Jacobson & Marshall, *supra* note 16, at 3.

[35] *See, e.g.*, English, M., Bellassai, J., *et. al.*, The case for the Pretrial Diversion of Heroin Addicts in the District of Columbia (Washington, DC, 1972) (Staff Report by the American Bar Association Special Committee on Crime Prevention & Control); Welsh, J., and Viets, D., The Pretrial Offender in the District of Columbia: A Report on the Characteristics and Processing of 1975 Defendants—(D.C. Bail Agency and Statistical Analysis Center, Office of Criminal Justice Plans & Analysis 1977). The latter study concluded (not surprisingly), after reviewing over 20,000 criminal cases filed in Washington, DC in 1975, that "[d]efendants charged with less serious crimes, those with fewer convictions, and those not on some form of conditional release received nonfinancial conditions of pretrial release more often than other offenders." *Id.* at XV-XVI.

[36] This has been repeatedly suggested by leading commentators as a real danger. *See, e.g.*, NEW JUSTICE, *supra* note 4; Jacobson & Marshall, *supra* note 16; and NAC COURTS REPORT, *supra* note 4.

involuntarily, nevertheless, there are some limited, unusual situations where offering diversion to a detainee may be appropriate.[37] In such cases, all parties, particularly the court, should take care to insure that the diversion decision by the detained accused is in fact voluntary and not merely a strategy for obtaining liberty at any cost. In addition, care should be taken to insure that pretrial diversion programs do not, by design or by circumstances, become third-party custody release programs. It must be remembered that the goals of pretrial diversion and those of third-party custody are basically different. While the former tries to eliminate the need for a criminal trial, the latter attempts to see that the individual will return to court for all scheduled court appearances, including trial. There exists a potential role conflict when one program or agency attempts to fulfill both functions simultaneously for the same defendant.[38]

STANDARD 1.3 A Defendant's Decision To Enter A Pretrial Diversion Program Should Be Voluntary.

COMMENTARY

This concept is so fundamental a consideration that it is included as a matter of definition.[39] Legal considerations aside, common sense dictates that a defendant's participation in pretrial diversion be voluntary. Since one of diversion's primary goals is to minimize arrest-provoking behavior on the part of program participants, failure on the part of the defendant to be interested in changing that behavior would obviously hinder progressive change and jeopardize successful completion of the pretrial diversion process. To eliminate free choice in opting for diversion is to negate the importance of participant motivation. This may defeat the entire purpose of diversion.

The accused's choice to participate in pretrial diversion must be an informed one in order to be truly voluntary. The other Standards contained in this Chapter are structured to enhance this concept. Standard 1.1 recommends that pretrial diversion occur only after formal filing of the charges and after access to counsel has been accorded so that the defendant knows the nature of the charge(s) against him and the possible con-

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[37] For example, in some jurisdictions non-residents might not be immediately bailable on charges eligible for diversion consideration while local residents similarly charged and eligible for diversion are routinely released. Likewise, particular characteristics of given defendants such as advanced education or a long familiarity with the criminal justice system might be such as to obviate the threat of implicit coercion if such persons were interviewed for diversion prior to being released.

[38] For a discussion of this and other potential role conflicts between the service-delivery (*i.e.*, counseling) and supervision functions of pretrial staff, *see, e.g.*, Rutherford, A., and McDermott, R., NATIONAL EVALUATION PROGRAM PHASE I SUMMARY REPORT: JUVENILE DIVERSION, 30 (LEAA, 1976).

[39] Voluntary enrollment has consistently been given the stature of a matter of definitional necessity when advocating pretrial diversion. *See, e.g.*, NAC COURTS REPORT, *supra* note 2, at 29; American Law Institute Model Code of Pre-Arraignment Procedure, §320.9.

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sequences if convicted. Standard 1.4 provides for evaluation of strategies other than pretrial diversion. The end result, hopefully, is that the defendant opts for or against diversion knowingly.

Finally, the choice must be uncoerced to the extent possible given the fact that the accused may face full prosecution if he does not opt for diversion. Accordingly, the court must make every effort to ensure that the choice is not only knowing but freely made. The court should inquire of the defendant whether he understands the nature of the charge(s), the requirements of the program and the consequences of failing to complete the program, and that he is waiving certain statutory and constitutional rights by opting for diversion. (Among these, depending on the jurisdiction, are the right to a speedy trial, the right to confront accusers, the right to a jury trial, the right to litigate certain pretrial motions, the right against self-incrimination, and the right to have the government prove guilt beyond a reasonable doubt). The court should determine whether any promises, threats or inducements (other than dismissal of the case for successful completion of the program) were made to entice the defendant to opt for diversion. The court should also satisfy itself that the defendant is not currently under the influence of alcohol or drugs or otherwise suffering from diminished capacity. It is argued that these determinations are necessary to minimize the likelihood of a coerced decision to enter diversion. Only then can it be said with confidence that diverting the case in question is clearly the preferable course of action from the view of all the parties concerned.

STANDARD 1.4 The Possibility Of Enrolling In A Pretrial Diversion Program Should Not Preclude A Defendant From Considering And Pursuing Other Strategies Which May Be More Advantageous To Him Than The Diversion Option.

COMMENTARY

While pretrial diversion from the defendant's perspective may be the most satisfactory avenue to take to secure a favorable disposition of the pending charge, this is not necessarily always the case. Accordingly, alternative strategies should be evaluated closely by the potential divertee, preferably with counsel assisting.

Obviously, a discussion of strategies other than diversion must occur in the context of discussing the diversion option itself. There must be a discussion of the pretrial diversion program's standard conditions which the defendant will be expected to meet and the consequences that could occur should he fail to meet them. The former must be weighed with other alternatives which may be less restrictive than entering the program. For example, a defendant might want to plead guilty to the charges and hope for unsupervised probation rather than have to comply with a pretrial diversion program's reporting conditions.

Further, there must be an honest appraisal of the likely consequences of opting for diversion and then failing to complete the program successfully. These Standards take the position that entry into a pretrial

diversion program should not be preconditioned on entry of a plea of guilty.[40] Since most programs in most jurisdictions operate consistent with this view and noncompletion of diversion leads to a return for prosecution for the underlying charges, possible prejudice to the defense case that might exist from delaying prosecution while enrolled in diversion should be evaluated. Will defense evidence remain accessible during this period? Will defense witnesses disappear or their memories fade?

In those jurisdictions which require conditional or deferred guilty pleas prior to diversion, the considerations are quite different. Here, failure to complete the program results in return to court not for trial but directly for sentencing. Consequently, the sanctions for termination under such conditions are immediate and real. In such situations, the defendant, by pleading guilty, has waived his right against self-incrimination, his right to confront his accusers, his right to a jury trial and his right to have the government prove guilt beyond a reasonable doubt. In deciding to waive these rights, the defendant must carefully and honestly weigh the likelihood of success in completing the diversion program versus the likelihood of conviction if he rejects the diversion option and chooses instead the adversary system.

An important tenet of our adversary system, based as it is on presumption of innocence, is that the defendant can test the sufficiency of the government's case prior to plea negotiation or trial through litigating various pretrial motions. As a matter of law, defense success with certain pretrial motions—for example, motions to suppress illegally seized evidence, tainted identification testimony, or illegally obtained confessions—is often dispositive of the case and leads to immediate dismissal. While courts have decided both ways,[41] it is the position of these Standards that the pretrial accused who otherwise meets diversion eligibility criteria should not be forced by the prosecution to forego the filing of pretrial motions in order to be considered for diversion. This is in keeping with the doctrine of minimization of penetration and with the general consensus that diversion should not be used as a dumping ground for weak cases or as a lever for imposing government control over defendants who, absent diversion, would not be so controlled.[42]

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[40] *See* Standard 2.3., *infra*, and accompanying commentary.

[41] *See Morse* v. *Municipal Court*, 118 Cal. Rptr. 14 (California Supreme Court, 1974) (Since defendants eligible for pretrial diversion under Penal Code §1000 may by statute consent to diversion "at any time prior to commencement of trial," a non-statutory requirement of the prosecutor that the defendant agree to waive litigating pretrial motions as a condition precedent to diversion is impermissible). *But compare United States* v. *James H. Smith*, 354 A.2d 510 (D.C. Court of Appeals, 1976) (because authorization for local F.O.T. Diversion Program was solely prosecutorial discretion, U.S. Attorney may, if he chooses, pre-condition eligibility on agreeing to waive litigating pretrial motions).
For a discussion of the *Morse* and *Smith* cases, *see* Pretrial Intervention Legal Issues, *supra* note 7, at 27, and Bellassai, J., *Pretrial Diversion: The First Decade in Retrospect*, Pretrial Services Annual Journal 14, 24-25 (Pretrial Services Resource Center, 1978).

[42] *See* notes 6, 8, 28-34, *supra*, and accompanying text.

In those jurisdictions where, as a matter of law or policy, potential divertees are required to forego the filing of such motions, provision should be made for diversion decision-makers (at the very least, the defendant and defense counsel, but preferably the prosecutor and the court also) to assess informally the likelihood of defense success should such motions be filed. Only in conjunction with such an analysis can it be said with confidence that the pretrial accused has been afforded the opportunity to make an informed decision as to whether pretrial diversion is the most desirable option.

Subsequent considerations which would be discussed with counsel include an evaluation of the likelihood of conviction if the defendant were to opt for prosecution in the adversary system. Subsequent to this evaluation, an assessment of possible sentences that could be imposed if convicted should be followed by a discussion of the likely sentence based on counsel's experience. It is only through this appraisal that the individual defendant can truly weigh the consequences of the various courses of action he may choose. For example, a defendant who believes himself innocent but fears the weight of the evidence against him may decide to require the government to prosecute if he sees probation as the most likely sentence he would receive if convicted. That same defendant may opt for diversion if the probable sentence he faces is incarceration. At any rate, an evaluation of success in defending against the charges and the consequences if unsuccessful must precede acceptance of an offer of diversion from the government.

STANDARDS

2.1 Formal Eligibility Guidelines Should Be Established and Reduced To Writing After Consultation Among Program Representatives And Appropriate Criminal Justice Officials. The Guidelines Should Be Distributed To All Interested Parties Including Prospective Program Participants.

2.2 Eligibility Criteria Should Be Broad Enough To Encompass All Defendants Who Can Benefit From The Diversion Option Regardless Of The Level Of Supervision Or Services Needed, Provided:

- The Guidelines Exclude Categories Of Nonserious Charges And Defendants For Which Less Penetration Into The System Routinely Occurs; and
- The Guidelines Exclude Those Cases For Which The Community Demands Full Prosecution.

2.3 Enrollment In Diversion Programs Should Not Be Conditioned On A Plea Of Guilty. In Rare Circumstances An Informal Admission Of Guilt Or Of Moral Responsibility May Be Acceptable As Part Of A Service Plan. Defendants Who Maintain Innocence Should Not Be Denied Enrollment Automatically.

2.4 No Conditions, Other Than Agreed-Upon Program Requirements, Should Be Imposed On Individual Divertees By The Court Or The Prosecutor.

2.5 A Standard Time Limit For The Duration Of Participation In The Diversion Process Should Be Established. No Defendant Should Be Required To Participate For A Longer Period Except In Extraordinary Circumstances. The Standard Term Should Be Long Enough To Permit Change Sufficient To Minimize Likelihood Of Additional Arrests, But Not So Long As To Prejudice The Prosecution Or Defense Of The Case Should The Participant Be Returned To The Ordinary Course Of Prosecution.

2.6 Prior To Making The Decision To Enroll In A Diversion Program, An Eligible Defendant Should Be Given The Opportunity To Review With Counsel A Copy Of The General Requirements Of The Diversion Program Including Average Program Duration And Possible Outcomes.

2.7 Defendants Who Are Denied Enrollment In A Diversion Program Should Be Afforded Administrative Review Of The Decision And Written Reasons Therefor. The Reasons Should Not Be Admissible As Evidence In Any Proceeding.

2.8 Diversion Programs Have An Affirmative Obligation To Ensure That Agreed-Upon Eligibility Guidelines Are Adhered To And Honored By Other Actors In The Diversion Process.

2.9 The Role Of The Prosecutor Is Central To The Eligibility Determination and Enrollment Process. In The Absence Of Statutory Provisions To The Contrary The Prosecutorial Prerogative To Initiate Diversion Consideration For Particular Defendants Should Be Preserved. Courts Have A Legitimate Role In Monitoring The Fair Application Of Diversion Eligibility And Enrollment Guidelines, Regardless Of Whether Local Law Also Accords The Judiciary An Active Role In The Diversion Enrollment Process.

STANDARD 2.1 Formal Eligibility Guidelines Should Be Established And Reduced To Writing After Consultation Among Program Representatives And Appropriate Criminal Justice Officials. The Guidelines Should Be Distributed To All Interested Parties Including Prospective Program Participants.

COMMENTARY

Substantial differences of opinion exist among prosecutors, judges, defense attorneys and program administrators as to which categories of defendants and charges should be divertible (See *Standard 2.2* and its *Commentary*) and the ways in which diversion screening should be carried out. Depending on the balance of power locally, one or two such parties are likely to have the dominant influence on diversion eligibility criteria. Notwithstanding such political realities, these Standards posit that all of the above actors in the criminal justice system should have some input in designing formal eligibility guidelines. Each of the above actors has a different, equally legitimate perspective on pretrial diversion and brings a different expertise to bear on the problem. Open dialogue among them should lead to a full airing of the issues and, thereafter, to establishment of eligibility criteria which all concerned can support.

While dialogue among criminal justice officials is essential it should be emphasized that programs must also make the case for pretrial diversion to all segments of their local communities. They must be sensitive to the concerns of the citizenry about crime and justice. In order to insure the existence of broad-based local support for diversion, program administrators as well as prosecutors, judges, and defense counsel should consult with local citizen groups and politicians in the development of eligibility criteria.

The eligibility guidelines developed should be in writing, available to and disseminated routinely to all interested parties. Most diversion programs, however, begin operations on the basis of informal interagency

agreements among themselves, prosecutors and the courts.[1] Only recently has concern over protection of basic legal issues such as equal protection and due process of law,[2] over social policy issues such as the extent to which diversion's primary purpose should be rehabilitation[3] and over the specter of expanding social control,[4] led to formal written interagency agreements and, in some cases, to court rules or legislation.[5]

It is the position of these Standards that in the absence of formal and written eligibility guidelines, possible abuses of the process cannot be

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[1] *See* ABA Pretrial Intervention Service Center, Pretrial Intervention Services: A Guide for Program Development 1-10, 27-29 (Washington, DC, 1977) (hereinafter cited as Program Development Guide); Bellassai, J., and Segal, P., Addict Diversion: An Alternative Approach for the Criminal Justice System, 60 GEO. L.J. 667, at notes 32-34, 52-54 and accompanying text (1972) (both review authorization techniques found among early diversion programs).

The most recent available listing of pretrial diversion programs nation-wide includes 148 programs in 42 states, the District of Columbia, and the territories. *See generally* American Bar Association Pretrial Intervention Service Center, Directory of Criminal Justice Diversion Programs, 1976 (Washington, DC, 1977) (hereinafter cited as 1976 ABA PTI Directory). In contrast, at the most recent count, only eight states had adopted general diversion legislation or state-wide court rules authorizing diversion. A few more states have specialized *drug* diversion statutes on their books as well. *See generally* Bellassai, J., *Pretrial Diversion: The First Decade in Retrospect, in* Pretrial Services Annual Journal, 1978 (Pretrial Services Resource Center, Washington, DC) (hereinafter cited as Bellassai).

[2] *See, e.g.,* Aaronson, D., *et. al.,* The New Justice: Alternatives to Conventional Adjudication (LEAA, 1977) (hereinafter cited as New Justice); American Bar Association Pretrial Intervention Service Center, Pretrial Intervention Legal Issues: A Guide to Policy Development (Washington, DC, 1977) (hereinafter cited as Pretrial Intervention Legal Issues).

[3] *See, e.g., People* v. *Superior Court of San Mateo County (On Tai Ho),* 113 Cal. Rptr. 21, 23-24 (1974) and State v. *Leonardis, Rose and Battaglia* (known collectively as *Leonardis I*), 71 N.J. 85, (1976) (Primary purpose of diversion is rehabilitation). *But compare* Jacoby, J., National Evaluation Program, Phase 1 Report: Pre-Trial Screening Projects 26 (LEAA, 1976) (hereinafter cited as Jacoby) (Primary benefit of diversion to prosecutors is as a case screening device).

[4] *See, e.g.,* Gorelick, J., *Pretrial Diversion: The Threat of Expanding Social Control, in* 10 Harvard Civ. Rights—Civ. Liberties L. Rev. 180 (1975) (hereinafter cited as Gorelick); Nejelski, P., *Diversion: The Promise and the Danger, in* Crime & Delinquency, vol. 22, No. 4, at 393 (1976) (hereinafter cited as Nejelski); and Keynote Address by Norvall Morris, Dean, University of Chicago Law School, to the 1975 National Conference on Pretrial Release and Diversion, April 14, 1975, *in* Final Report, 1975 National Conference on Pretrial Release and Diversion, 17 (NAPSA, Nat'l Center for State Courts, and ABA PTI Center, October, 1975).

[5] New Jersey and Pennsylvania have adopted court rules as of this date, while Arkansas, Colorado, Connecticut, Florida, Massachusetts, Tennessee and Washington have enacted legislation. *See* Bellassai, *supra* note 1, at notes 22, 32, 62, 89 and accompanying text. Legislation as of this printing is also pending in other states, notably California and Ohio. For the text of the New Jersey and Pennsylvania Court rules and most of the aforementioned statutes, see American Bar Association Pretrial Intervention Service Center, Authorization Techniques for Pretrial Intervention Programs, A Survival Kit, at Appendices C and D respectively (Washington, DC, 1977) (hereinafter cited as Survival Kit).

challenged. Moreover, unless guidelines are routinely disseminated, legitimate access to needed information by defendants, the defense bar and the community as a whole is impeded.[6]

STANDARD 2.2 Eligibility Criteria Should Be Broad Enough To Encompass All Defendants Who Can Benefit From The Diversion Option Regardless Of The Level Of Supervision Or Services Needed, Provided:

- The Guidelines Exclude Categories Of Non-Serious Charges And Defendants For Which Less Penetration Into The System Routinely Occurs; and
- The Guidelines Exclude Those Cases For Which The Community Demands Full Prosecution.

COMMENTARY

An area of continuing controversy among criminal justice policymakers and diversion practitioners themselves is what categories of charges and defendants should be eligible for diversion.[7] At one end of the spectrum there are non-serious charges and so-called "light offenders" which most would agree are appropriate for diversion enrollment. At the

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[6] This is precisely the point made by the New Jersey Supreme Court in its recent landmark case of *State* v. *Strychnewicz*, 71 N.J. 85 (1976). Publishing eligibility criteria and keeping a record of exclusions for later administrative or judicial review has also been strongly recommended by major studies of pretrial alternatives. *See, e.g.*, National Advisory Commission on Criminal Justice Standards and Goals, Task Force Report on Corrections 95-97 (Washington, DC, 1973) (hereinafter cited as NAC CORRECTIONS REPORT); New Justice, *supra* note 2, at 26-28; American Law Institute Model Code of Pre-Arraignment Procedure. §320.9 (Tentative Draft No. 5, 1972) (hereinafter cited as ALI Model Code).

Legal commentators in recent years have echoed the same view. *See, e.g.*, Bubany, C., and Skillern, F., *Taming the Dragon: An Administrative Law for Prosecutorial Decision-Making*, 13 Amer. Crim. L. Rev. 473, 501 (1976) (hereinafter cited as Bubany & Skillern); Pretrial Intervention Legal Issues, *supra* note 2, at 14.

[7] The New Jersey Supreme Court, for example, in *Leonardis I*, stated that diversion eligiblity consideration should be broad enough to encompass any defendant motivated toward and likely to benefit from diversion, regardless of offense charged. 71 N.J. 85, 95 (1976). This view was likewise advanced by one of the foremost legal commentators to address these issues. *See* Zaloom, J., *Pretrial Intervention Under New Jersey Court Rule 3:28, Proposed Guidelines for Operation, in* Criminal Justice Quarterly, Vol. 2, No. 4 (Fall, 1974), reprinted by the ABA PTI Center in its Pretrial Intervention Article Reprints Series (no. 2, January, 1975), at 20 (hereinafter cited as Zaloom).

In contrast, the majority of other commentators have endorsed, or at least acquiesced in, the appropriateness of limiting diversion eligibility to certain predetermined classes of defendants and/or charges. *See, e.g., Hearings on H.R. 9007 and S. 798 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974) (hereinafter cited as 1974 House Hearings) at 481-60 (statement of Genessee County, Michigan Prosecutor Robert F. Leonard, an early diversion proponent); National District Attorneys' Association, Monograph on Philosophical, Procedural, and Legal Issues Inherent in Prosecutor Diversionary Programs (Chicago, Illiniois, 1974) (hereinafter cited as NDAA Monograph); Mullen, J. The Dilemma of Diversion: Resource Materials on Adult Pre-Trial Intervention Programs 9-12, 74-76 (LEAA, 1974) (hereinafter cited as Mullen).

other end are the obviously heinous and violent offenses and so-called "hardened" defendants; they are generally excluded. Which, and to what extent, those charges and defendants who fall in the middle of the spectrum are accorded diversion eligibility consideration varies substantially from one jurisdiction to the next.[8] Many criminal justice systems and local programs employ almost blanket, presumptive eligibility for minor charges and first offenders. Other categories, viewed as more serious risks, become eligible on a selective, case-by-case basis only.[9] Almost every jurisdiction and local program routinely excludes certain defendants based solely on the serious nature of the present offense charged.[10]

The rationale generally advanced for limiting diversion eligibility in these areas is that certain types of defendants are, by the very nature of the offense charged, less deserving of or less amenable to the benefits to be derived from diversion.[11] While this approach is hard to reconcile with the legal presumption of innocence and while correctional studies do not support the premise that offense charged is predictive of future dangerousness or amenability to rehabilitation,[12] nevertheless, this remains the dominant thinking on the subject.[13]

Recently, courts have begun to respond to due process and equal protection challenges to charge exclusions from diversion. In the landmark case of *State* v. *Leonardis*[14] (known as *Leonardis I*), the New Jersey Supreme

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[8] *See generally* 1976 ABA PTI Directory, *supra* note 1. *See also* discussion of this point in Abt Associates, Inc., Pretrial Intervention, A program evaluation of nine manpower-based pretrial intervention projects, final report, 192 (1974) (hereinafter cited as Abt. Report); and in Loh, W., *Pretrial Diversion from the Criminal Process*, 83 YALE L. J. 827, (1974) (hereinafter cited as Yale Note).

[9] New Justice, *supra* note 2, at xi, 26, 33; Mullen, *supra* note 7, at 10, 74-76; Gorelick, *supra* note 4, at 186-87.

[10] *See generally* 1976 ABA PTI Directory, *supra* note 1. *See also* Mullen, *supra* note 7, at 10, 74-76; and New Justice, *supra* note 2, at xi, 26, 33.

[11] This rationale was relied upon by the U.S. Supreme Court in the important case of *Marshall* v. *United States* to validate the two-prior-felonies-exclusion contained in the Federal Narcotics Addict Rehabilitation Act (NARA), 18 U.S.C. §4251 (f)(i)(4). *See* 414 U.S. 417 (1974). This *Marshall* line of reasoning has been widely construed as equally applicable to non-statutory pretrial diversion, as well, for addicts and non-addicts alike. *See, e.g.*, Bellassai, *supra* note 1, at 22; Pretrial Intervention Legal Issues, *supra* note 1, at 4-5; Jaszi, P., and Pearlman, H., Legal Issues In Addict Diversion: A Technical Analysis 49-55 (Drug Abuse Council, Inc., and ABA Corrections Commission, 1975) (hereinafter cited as Jaszi & Pearlman).

[12] *See, e.g.*, Locke, J., Penn, R., *et. al.*, Compilation and Use of Criminal Court Data in Relation to Pretrial Release of Defendants: Pilot Study (National Bureau of Standards, Technical Note 535) (1970); Note, Preventive Detention: An Empirical Analysis, 6 Harv. Civ. Rts.—Civ. Lib. L. Rev. 291 (1971); *See also* Hickey, P., *Preventive Detention: The Crime of Being Dangerous*, Geo. L. J. (1971).

[13] *See* note 7, *supra*. Of the eight current state diversion statutes, six limit diversion eligibility on the basis of present charge and/or prior criminal record. *See* Survival Kit, *supra* note 5, at Appendix D. Pending federal diversion legislation, S. 1819, which passed the Senate on *April 27*, 1978, would do likewise. *See* National Council on Crime and Delinquency, *Criminal Justice Newsletter*, "Senate Passes Diversion Bill", vol. 9, no. 10, May 8, 1978, p. 2, col. 1.

[14] 71 N. J. 85 (1976).

Court struck down a county prosecutor's uniform exclusion for defendants charged with selling hard drugs. In ruling that diversion selection by the prosecutor under New Jersey Court Rule 3:28 and existing Judicial Guidelines[15] must be on a case-by-case basis and according to a balancing of all pertinent factors, not just offense charged, the Court stated: "[W]e find the exclusionary criteria [in question] accord misplaced emphasis to the offense with which a defendant is charged and hence fail to emphasize the defendant's potential for rehabilitation."[16]

Other than present offense charged, the most common criterion relied upon to exclude uniformly certain classes of defendants from diversion consideration has been prior conviction record. Almost all jurisdictions and local diversion programs exclude defendants with certain sorts of prior convictions especially for felonies.[17] To the extent that these exclusions are based on prior conduct which has been adjudicated as law violations, they are more defensible than exclusions based on present, unadjudicated offenses charged. The case law that exists on the issue of prior crimes exclusion from programs of alternatives to incarceration supports the permissibility of at least some of these exclusions.[18] Whether and to what extent local planners and policymakers want to impose hard and fast prior conviction exclusions is another matter. It is the position of these Standards that no benefit is derived from uniform exclusions that cannot be realized from selective exclusions, after preliminary review, on a case-by-case basis.

In their formative years, many diversion programs excluded various categories of defendants on the basis of age, sex, socio-economic status and place of residence.[19] The rationales given for these exclusions were generally that the programs were experiments geared by design to specialized populations[20] and that the limited resources of small pilot programs prevented enrolling all defendants who might conceivably benefit from diversion.[21] Legal commentators and professional researchers who, in earlier years, looked at these rationales for exclusion tended to find

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[15] These mandatory Guidelines were promulgated July 8, 1976 by Chief Judge Richard Hughes of the New Jersey Supreme Court, and were published and incorporated into the text of the *Leonardis I* decision, handed down July 21, 1976. The Guidelines are substantially identical to those proposed in 1975 by the then chief of Pretrial Services for the State of New Jersey, J. Gordon Zaloom. *See generally* Zaloom, *supra*, note 7.

[16] 71 N. J. 85, 94-95 (1976).

[17] *See generally* 1976 ABA PTI Directory, *supra* note 1.

[18] *Marshall* v. *United States* is the leading case. *See* note 11, *supra*. It over-ruled well-reasoned earlier federal circuit court decisions which had come out with the opposite conclusion on the same issue. *See, e.g., Watson* v. *United States*, 439 F.2d 442 (D.C. Cir., 1970) (*en banc*); *United States* v. *Hamilton*, 462 F.2d 1190 (D.C. Cir., 1972) and *United States* v. *Bishop*, 469 F.2d 1337 (1st Cir., 1972).

[19] Pretrial Intervention Legal Issues, *supra* note 1, at 5-7; Mullen, *supra* note 7.

[20] These rationales are summarized in Biel, M., Legal Issues and Characteristics of Pretrial Intervention Programs (ABA PTI Service Center, Washington, DC, 1974).

[21] *Ibid.*

them defensible.[22] As diversion programs enjoy success, expand their operations and, ultimately, leave behind their pilot status and become institutionalized, these exclusions become less and less valid for the reasons originally stated. Certain of these typical exclusions found in earlier programs—age and sex, for example—are generally regarded in the law as suspect classifications which are defensible only if they serve compelling state interests.[23] It is suggested that institutionalized diversion programs would generally be hard-pressed to justify continued exclusions on these bases.[24]

Another commonly encountered exclusion from diversion has been defendants who are non-residents of the jurisdiction wherein arrested.[25] While many diversion programs have established informal ties with similar programs in other jurisdictions, thereby allowing defendants diverted in one place to be serviced and supervised elsewhere, many criminal justice systems have uniformly excluded non-residents from diversion consideration.[26] Emerging case law in this area[27] at least from states which have statewide systems of diversion in place,[28] suggests that such exclusions are denials of due process and equal protection.[29]

STANDARD 2.3 Enrollment In Diversion Programs Should Not Be Conditioned On A Plea Of Guilty. In Rare Circumstances An Informal Admission Of Guilt Or Of Moral Responsibility May Be Acceptable As Part Of A Service Plan. Defendants Who Maintain Innocence Should Not Be Denied Enrollment Automatically.

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[22] *See, e.g.*, Biel, *supra* note 20, and Skoler, D., *Protecting the Rights of Defendants in Pretrial Intervention Programs*, Crim. L. Bull., vol. 10, no. 6, at 482 (August, 1974) (hereinafter cited as Skoler).

[23] For a good discussion of this topic in the context of pretrial diversion eligiblity exclusions, *see* Pretrial Intervention Legal Issues, *supra* 2, at 3-9.

[24] This conclusion is vigorously pressed by the well-respected team of American University Law School professors who co-authored New Justice, *supra* note 2. Noting that courts defer making rigorous equal protection demands on small, experimental pilot programs, they go on to warn that "[n]evertheless, a day of reckoning on the issue of distributional fairness will come for every pretrial alternatives program which survives the experimental phase to become an institution of the criminal adjudication system." Id. at 26.

[25] Pretrial Intervention Legal Issues, *supra* note 1, at 7.

[26] The non-resident exclusion is discussed and argued against in Pretrial diversion Legal Issues, *supra* note 2, at 7. *See also* the New Jersey and California lines of cases addressing the issue, as indicated at note 27, *infra*.

[27] *People* v. *Reed*, 118 Cal. Rptr. 14 (1974); *State* v. *Nolfi*, 141 N.J. Super. 5-28 (Law Div.) (1970); and *State* v. *Kowitski*, 145 N.J. Super. 237 (Law Div.) (1977).

[28] California's Penal Code §1000 drug diversion statute and New Jersey's Supreme Court Rule 3:28 have given rise to most of these cases.

[29] *See also* the discussion of these cases and their implications in Bellassai, *supra* note 1, at notes 72, 118-120 and accompanying text. For a broader perspective on the current state of federal and state case law in the area of geographic discrimination in the receipt of government-sponsored benefits, *see* Pretrial Intervention Legal Issues, *supra* note 1, at 7-8.

COMMENTARY

Certain pretrial diversion programs require eligible defendants to plead guilty prior to enrollment. In jurisdictions which require the defendant's decision to participate prior to access to counsel (and contrary to the recommendation of these Standards[30]) many defendants may enter that requisite plea without full awareness of its consequences, without full knowledge that they may be irreversibly waiving their Fifth Amendment privilege against self-incrimination and their rights to trial by jury and confrontation of their accusers.[31] Under such circumstances, the defendant's plea of guilty may not meet the requirements of law that it be "intentional, voluntary and intelligent."[32]

Even when the defendant benefits from assistance of counsel, the court must determine whether the plea of guilty is entered voluntarily.[33] While there is no Supreme Court ruling on point, entry of a plea of guilty as a pre-condition of diversion might well meet the standards established in other cases where the guilty plea was held voluntary even though there was no admission of actual participation in the acts constituting the crime.[34] Nevertheless, a real danger to pretrial diversion enrollment conditioned on a plea of guilty is the potential for diversion to become merely a form of plea bargaining rather than an alternative to prosecution in its own right.[35]

Some have advanced the argument that requiring a guilty plea prior to diversion has a therapeutic value.[36] It demonstrates a step toward 'rehabilitation through admission and presumably repentance'... and it may increase the leverage of the treatment staff and prosecutor in forcing

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[30] Almost every legal commentator and national report and study group which has considered the issue has strongly opposed requiring a plea of guilty as a precondition of diversion. *See, e.g.*, National Advisory Commission on Criminal Justice Standards and Goals, Report on the Courts 27, 28 (Washington, DC, 1973) (hereinafter cited as NAC COURTS REPORT); Pretrial Intervention Legal Issues, *supra* note 2, at 28-32; NDAA Monograph, *supra* note 7, at 8. Bellassai & Segal, *supra* note 1, at 696; Bubany and Skillern, *supra* note 6, at 542; Jaszi & Pearlman, *supra* note 11, at 63-67; Skoler, *supra* note 22, at 486; ALI Model Code §320.9, *supra* note 6; *Hearings Before the Subcommittee on National Penitentiaries of the Senate Committee on the Judiciary*, 93d Cong., 1st Sess. 375 (1973) (statement of Keith Mossman, chairman, ABA Criminal Law Section) (hereinafter cited as 1973 Senate Hearings).

[31] Pretrial Intervention Legal Issues, *supra* note 1, at 28-29; Jaszi & Pearlman, *supra* note 11, at 63-64; New Justice, *supra* note 2, at 25-26.

[32] *Miranda* v. *Arizona*, 384 U.S. 436 (1966). *See also Boykin* v. *Alabama*, 395 U.S. 238 (1969).

[33] *McCarthy* v. *United States*, 394 U.S. 459 (1969).

[34] *Brady* v. *United States*, 397 U.S. 742 (1970); *North Carolina* v. *Alford*, 400 U.S. 26 (1970). For a discussion of the applicability of these cases by analogy to the diversion process, *see* Pretrial Intervention Legal Issues, *supra* note 1, at 30-32.

[35] NAC COURTS REPORT, *supra* note 30, at 29-30, NDAA Monograph, *supra* note 7, at 8; Pretrial Intervention Legal Issues, *supra* note 2, at 28-29.

[36] *See, e.g., 1973 Senate Hearings*, *supra* note 30, at 397 (statement in support of guilty plea as therapeutic by the Assistant Attorney General for Legislative Affairs James D. McKevitt).

persons to remain in diversion programs.[37] While this perspective has its proponents, its benefits have never been validated statistically. It also is in direct contradiction with the position taken in Standard 1.3, *supra*, and Standard 5.1, *infra*, that entry into diversion must be voluntary and continued participation in the program must be voluntary, respectively.

It is the view of these Standards that if diversion programs attempt to provide an actual pretrial alternative by helping the individual avoid future arrest-provoking behavior, then the requirement of an initial guilty plea in order to be allowed to partake of program services achieves no useful purpose for either the criminal justice system or the divertee. As posited in Standards 3.1 through 3.4 and their respective *Commentaries*, service delivery should not be viewed as therapeutic at all. While the participant's service plan should address his personal and economic needs in such a way as to obviate any propensity for future arrests, this is quite apart from discussion of possible past crimes, including the offense charged. (See Standards 6.1 and 6.5, *infra*).

These Standards reject the requirement of entry of a plea of guilty prior to diversion enrollment and consider the use of informal admissions of guilt or moral responsibility as devices to be used only with great caution.[38]

The reservation expressed here and elsewhere in these Standards that a conditional guilty plea is of questionable value also pertains to informal admissions of guilt.[39] In atypical circumstances where the nature of the offense alleged is inextricably tied to the arrest-provoking behavior, it may be beneficial for an admission of moral responsibility to be made by the divertee as an aid toward avoiding further arrests.[40] For example, in a situation where the defendant has been arrested for destruction of property resulting from a domestic altercation, it may be helpful as part of the service plan for him to understand his part in the dynamics which led to arrest so that similar situations could be handled differently in the future. In those limited situations where an informal admission of guilt might enhance the effectiveness of the diversion process under no circumstances should that admission later be admissible into evidence if the defendant is returned to court for prosecution.[41]

Similarly, the use of restitution or volunteer work reflecting moral responsibility for the alleged offense should be utilized sparingly, on a

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[37] *See* Bellassai & Segal, *supra* note 1, at 697; Narimatsu, S., *Deferred Prosecution and Deferred Acceptance of A Guilty Plea, in* National District Attorney's Association, A Prosecutor's Manual on Screening and Diversionary Programs (Chicago, Illinois, 1974).

[38] This is also the view expressed by the American Bar Association Pretrial Intervention Service Center in its publications. *See, e.g.*, Pretrial Intervention Legal Issues, *supra* note 2, at 33-35.

[39] *See Hearings on S.1819, the Federal Criminal Diversion Act of 1977, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 96th Cong., 2d Sess. 81-82 (1978) (hereinafter cited as 1978 Senate Hearings) (Statement of Pretrial Services Resource Center, Director Madeleine L. Crohn).

[40] See discussion of recommended approches to divertee service plans in Standards 3.1-3.4 *infra* and accompanying *Commentary*.

[41] *See* Standard 6.2, *infra*, and accompanying *Commentary*.

case-by-case basis, and in amounts negotiated between diversion staff and the participant. The only appropriate vehicle for the attaching of such conditions is the service plan, with the agreement of the divertee and under the parameters noted in Standard 3.4 and its *Commentary*. Agreement to perform restitution or volunteer work should not be arbitrarily imposed subsequent to diversion enrollment. In addition, these options should be utilized only in jurisdictions where policymakers have adopted them for post-conviction sentencing options.[42]

Caution should be exercised in including restitution in a specific service plan. When a defendant agrees to restitution, this agreement may, if admissible, negatively affect the defendant's case if he is eventually remanded to the court upon non-completion of the program. In addition, indiscriminate use of the restitution option could seriously jeopardize completion of the program should the defendant be unable to afford the restitution requirement. These situations become more likely and potentially abusive where poor defendants are involved and inevitably lead to denial of equal protection considerations.[43]

Even if restitution is not monetary but only symbolic, the benefits to be derived from imposing such condition may be of illusory value to the defendant and to the victim. Its purpose, if any, should be related to service plans tailored for each individual consistent with Standard 3.4 and its *Commentary, infra*. More widespread use leads to the problems enumerated above and might well turn the diversion program into a collection agency.[44]

The use of the condition of unpaid, volunteer work also has its problems. Not only may this have the same implications as restitution if the defendant is returned to court for prosecution but also may well be in violation of the involuntary servitude clause of the Thirteenth Amendment.[45]

Some commentators have argued that if innocent defendants are diverted, this represents another dangerous form of overreach.[46] Others ask how a defendant can be helped or rehabilitated if he does not feel responsible for the crime committed.[47] Those who advance such arguments, fail to take into account that while the adversary process ideally is

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[42] *See* Pretrial Intervention Legal Issues, *supra* note 2, at 33-35.

[43] *Id.* at 34.

[44] *See* Pretrial Intervention Legal Issues, *supra* note 2, at 33.

[45] *See* Pretrial Intervention Legal Issues, *supra* note 2, at 35. This rationale, of course, presumes that to some significant degree, participation in pretrial diversion is inherently coercive. Leading national studies have come to the latter conclusion. *See, e.g.*, NAC COURTS REPORT, *supra* note 30, at 29,34; NEW JUSTICE, *supra* note 2, at 25.

[46] This is strongly suggested, for example, by Gorelick, *supra* note 4, at note 98 and accompanying text, and by NAC Courts Report, *supra* note 30, at 30,33. For an eloquent statement of the contrary view, *see 1978 Senate Hearings, supra* note 3q, at 77-78 (Statement of Pretrial Services Resources Center Director Madeleine L. Crohn).

[47] *See, e.g.*, Statements of Assistant U.S. Attorney General McKevitt and Genessee County, Michigan prosecutor Leonard to this effect in *1973 Senate Hearings, supra* note 36, at 397, 497, respectively.

a search for truth, in fact, guilty persons are sometimes acquitted and innocent ones convicted in this imperfect world. Thus, a defendant who knows he is innocent of the crime charged and decides to face traditional prosecution rather than opt for diversion cannot be assured of a dismissal or acquittal. At trial the defendant who maintains his innocence and for that reason is denied diversion may find himself later on in the anomalous position of having been convicted and having a criminal record while the defendant who was guilty in fact but who successfully completed the diversion program has charges dropped and receives no conviction record at all.

While every encouragement should be given to defendants who maintain their innocence to exercise their right to make the government prove its case beyond a reasonable doubt at trial, those defendants who, in the end, prefer to take the diversion option, understand the requirements that will be placed on them, and are willing to face the possibility of return to court for prosecution upon failure to complete the program should be given the same opportunity to enroll as those defendants under consideration for diversion who do not raise the issue of innocence or guilt at all.[48] The role of defense counsel in assisting the potential divertee to weigh his options in a considered fashion is crucial here. (See Standard 1.4 and its *Commentary.*)

It must not be forgotten that the paramount objective of the diversion program is not to tie receipt of services in any direct way to the crime allegedly committed, but to help the individual generally achieve a more stable life situation in order to avoid future arrests. The defendant who is innocent in fact as well as presumptively innocent at law has undergone the experience of an arrest and may need the supportive services of a diversion program to overcome a possibly bitter experience. To deny that support in those instances where the defendant asserts his innocence is to misunderstand the basic utility of the diversion option. As one commentator has noted:

> To take any steps to bar the participation of such persons would be an unwarranted discrimination. Innocent defendants, as well as those who are actually guilty, face harm from the disruptive process of full prosecution and can, if convicted, be harmed by the affixing of a criminal label. . . . The extent to which this is true in practice is not relevant; a defendant who intelligently weighs the risks between the relative sure-thing of PTI and the possibility of conviction at trial, and who chooses PTI, should be recognized as having a right to make either election.[49]

STANDARD 2.4 No Conditions, Other Than Agreed-Upon Program Requirements, Should Be Imposed On Individual Divertees By The Court Or The Prosecutor.

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[48] Zaloom, *supra* note 7, at 21-22.

[49] *Ibid.*

COMMENTARY

These Standards take the position that pretrial diversion should occur only after the pretrial release decision has been made. Statutes and case law empower the bond-setting judicial officer at that time to set conditions of release reasonably related to ensuring the defendant's return to court on scheduled court dates and the safety of the community.[50] The prosecutor at this stage in the proceedings is permitted to request specific conditions of release related to likelihood of flight and danger to the community.[51]

While these Standards support the imposition of conditions of pretrial release where indicated, they oppose the setting of any additional conditions other than agreed-upon program requirements by the court or prosecutor once bond has been set and diversion is offered. These Standards do suggest that while there should be and routinely is judicial and prosecutorial input in devising general eligibility guidelines for a diversion program, it is quite another matter for criminal justice policymakers to impose additional requirements on individual divertees at random. Fairness demands identical minimum requirements for successful completion of the program for all divertees with the identical result (dismissal) upon successful completion. Additional service plan development should be left to the program staff, which has greater expertise in assessing defendant needs and available resources to meet those needs.

While it is recognized that in actual practice some courts impose more stringent program requirements on one defendant than on another it is suggested that the practice is an unsound one that may jeopardize successful program completion. Not only is there the possibility that the special conditions imposed by judges or prosecutors will be so stringent as to overburden the defendant and cause him to falter prior to program completion, but it may well increase the diversion staff's difficulty in dealing with specific defendants. The staff may be put in the untenable position of trying to monitor requirements it cannot enforce or trying to justify conditions to the divertee which go beyond those they consider appropriate. The divertee may feel he is being treated unfairly and thwart staff efforts to assist him in completing the program.

STANDARD 2.5 A Standard Time Limit For The Duration Of Participation In The Diversion Process Should Be Established. No Defendant Should Be Required To Participate For A Longer Period Except In Extraordinary Circumstances. The Standard Term Should Be Long Enough

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[50] *See generally* American Bar Association Project for Standards on Criminal Justice, Pretrial Release (Approved Draft, 1972) and cases cited therein; Freed, D., and Wald, P., Bail Reform in the United States (1964); Foote, C., *The Coming Constitutional Crisis in Bail*, 113 Univ. PA. L. REV. 959 (1965); Thomas W., Bail Reform in America (1977); NAC CORRECTIONS REPORT, *supra* note 1, at Standard 4.4; Federal Bail Reform Act of 1966, 18 U.S.C. §§3141 *et. seq.* (1970).

[51] Cox, S., *Prosecutional Discretion: An Overview*, 13 AMER. CRIM. L. REV. 379, 430-31 (1976) (hereinafter cited as Cox).

To Permit Change Sufficient To Minimize Likelihood Of Additional Arrests, But Not So Long As To Prejudice The Prosecution Or Defense Of The Case Should The Participant Be Returned To The Ordinary Course Of Prosecution.

COMMENTARY

One of the primary goals of pretrial diversion is to enable the system to conserve its resources for cases which would be more appropriately handled through the adversary system.[52] In attempting to achieve this goal, it would seem that the entire diversion process should not be longer, and therefore not significantly more costly, than necessary to achieve another primary goal, that of deterring and reducing crime by impacting on arrest-provoking behavior.[53] Consistent with these goals, this Standard proposes that the routine time limit for pretrial diversion be the shortest possible.

Each jurisdiction must decide, when initiating its diversion program, what the maximum length of time that normal prosecution can safely be deferred should be. While particularized local needs should be reflected in this decision there are two primary issues which must be addressed in reaching a final decision. First, after what period of time is it likely that, because of the probable unavailability of witnesses or the dulling of memory, either the prosecution or the defense would have difficulty in effectively proceeding to trial? Second, how long will it take to complete service plans to effect sufficient change in participants so that the likelihood of future arrests is minimized and dismissal of charges is warranted?[54]

The nature and extent of offenses which local policymakers deem worthy of diversion consideration may also affect this decision. A program diverting only misdemeanants will not ordinarily have lengthy service plans for its divertees. While the type and classification of charge may not directly relate to participants' needs for services and change, some consideration must be given to the criminal penalties that could be imposed were the defendant to be found guilty at trial. A participant charged with shoplifting, for example, reasonably should not be required to participate more than 3-6 months absent unusual needs.

It must also be recognized that in many cases, the accomplishment of a service plan will not effect complete and lasting change in a participant in a short period. After periods of six months to one year, for most participants, sufficient change should have taken place to make a reasonable prediction as to the divertee's potential for law-abiding behavior. For participants for whom a regimen of substance abuse treatment and/or psychotherapy is prescribed in the service plan, full rehabilitation could well

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[52] NAC COURTS REPORT, *supra* note 30, at 28; NDAA Monograph, *supra* note 7, at 6-7.

[53] NAC COURTS REPORT, *supra* note 30, at 39-40; ALI Model Code 320.5 (1)(h); ABA Program Development Guide, *supra* note 1, at 11.

[54] *See* Standards 3.1-3.4, *infra*, and accompanying commentary.

take many years. Over the course of a shorter period it should be possible to ascertain the likelihood of whether the participant will continue on his own in such a therapeutic program after the diversion process ends.

Many states that have enacted statutes or court rules limiting the diversion term have adopted maximum time periods of from six months to two years.[55] The statutes appear to be geared to the level of divertable offenses. Florida, for example, limits enrollment to first-offender misdemeanants and lower-level felons, and limits diversion participation to six months.[56] New Jersey likewise authorizes participation for a standard period of six months, but due to the special problem of servicing substance abusers, it permits diversion for up to one year in such cases.[57]

It should also be recognized that pretrial diversion is not designed for all defendants. The program is but one alternative to incarceration in a continuum which includes probation and parole. If, in the judgment of program initiators, a lengthy period of supervision is needed for certain types of defendants with complex service needs or for defendants who are charged with certain types of offenses, the use of probation rather than pretrial diversion might be more appropriate for such cases. The average maximum participation limit of one year is recommended by the National Advisory Commission on Criminal Justice Standards and Goals[58] and the American Law Institute,[59] and in the long-pending federal diversion legislation, a one year period appears to have reached final acceptance.[60]

STANDARD 2.6 Prior To Making The Decision To Enroll In A Diversion Program, An Eligible Defendant Should Be Given The Opportunity To Review With Counsel A Copy Of The General Requirements Of The Diversion Program, Including Average Program Duration And Possible Outcomes.

COMMENTARY

Standards 1.1 through 1.4 and *Commentary* emphasize the need for a voluntary and informed choice when entering into pretrial diversion and the important assistance counsel can offer when making this choice. The potential divertee should review the various alternatives to diversion. An informed review necessitates a detailed understanding of the diversion program.

Ideally, this detailed understanding should be reached through informational services offered by programs prior to official enrollment and

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[55] *See* Survival Kit, *supra* note 5, at Appendices C and D.

[56] *See* §944.025(3), Florida Statutes Annotated, as amended by §6, Florida Correctional Reform Act of 1974, *in* SURVIVAL KIT, *supra* note 5, at Appendix D.

[57] *See* New Jersey Supreme Court Rule 3:28(d). *Id.* at Appendix C.

[58] NAC COURTS REPORT, *supra* note 30, at 39-40.

[59] ALI Model Code, *supra* note 6, at §390.5(b)(1).

[60] S. 1819 The Federal Criminal Diversion Act of 1977, 96th Cong. 1st Sess. at § (1977).

through meaningful consultation about the program with counsel. A program representative should be available to inform the potential divertee, preferably in the presence of counsel, about the following: a factual description of the program, including philosophy and methodology; specific requirements of the program; normal duration of the program and probable restrictions on freedom; a statistical representation of success rates in cases similar to that of the defendant's; and the degree of confidentiality that will be accorded statements made by the divertee during participation in the program. Where actual person-to-person representations by the program are not feasible or too costly the above information should be conveyed by descriptive literature to the potential divertee and his counsel.

Counsel also plays an essential part in helping the defendant understand the possible legal benefits and detriments that could flow from participation. He should review with the defendant the probable consequences of successful completion of the program or failure to do so. He should also discuss the effect of the waiver of any rights required as a condition of diversion and whether such a waiver could be successfully challenged at a later date should non-completion occur. Counsel should make the potential divertee aware of any collateral effects of pretrial diversion, including practical and legal effects of expungement of arrest records or lack of expungement as well as the presumption of guilt and stigma which, in some quarters, may be associated with participation in diversion programs. Another consideration which should be addressed is whether, in the event of non-completion, renewed prosecution, and conviction, the defendant could receive any credit against his sentence for the time already spent in the diversion program.

It is only when the diversion program and counsel work in concert with the potential divertee that a true understanding of the diversion option can be reached. The need for this understanding cannot be minimized, for, as one commentator has noted:

> [t]he accused remains fully subject to prosecution and criminal sanctions (fine, probation, incarceration) for alleged criminal conduct if he/she (i) fails to meet the program requirements for successful termination or (ii) in some cases, fails to convince the prosecutor or judge that a positive determination as to satisfactory participation merits dismissal of the prosecution.[61]

STANDARD 2.7 Defendants Who Are Denied Enrollment In A Diversion Program Should Be Afforded Administrative Review Of The Decision And Written Reasons Therefor. The Reasons Should Not Be Admissible As Evidence In Any Proceeding.

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[61] Jacobson, S., and Marshall, J., *Defender Operated Diversion—Meeting the Requirements of the Defense Function*, NLADA Briefcase, vol. XXIII, no. 1 at 3 (June, 1975).

COMMENTARY

In jurisdictions where the final decision concerning diversion enrollment is made by the program administrator or the prosecutor, administrative review of that decision should be afforded the defendant. This requirement might simply be met by an informal appeal to the administrator's or prosecutor's superiors. Some jurisdictions have provided for judicial review of the final decision on diversion enrollment.[62] The New Jersey Supreme Court, in noting the advantages of this type of review and the need for disclosure of reasons for denial, stated in the *Strychnewicz* case that:

> Providing a defendant with reasons for the denial of his application will not only allow a defendant to adequately prepare for judicial review of that decision, but will also promote the rehabilitative function which the PTI concept serves. At the very least, disclosure will alleviate existing suspicions about the arbitrariness of given decisions and will thereby foster a respect for the fair operation of the law.[63]

These Standards take the position that some sort of administrative review of the final diversion enrollment decision is essential. In practice, a motions-type hearing before a judicial officer may be rejected as too cumbersome or a violation of separation of powers.[64] Individual jurisdictions may decide instead that an informal hearing before an independent hearing officer may offer the most appropriate review of the decision prohibiting entrance into, or even continuation in, the diversion program.

Consistent with Standard 6.2, *infra*, written reasons in support of denial of diversion enrollment should not be admissible as evidence nor allowed to prejudice the defendant's case in any way. Finally, it is the position of this Standard that while program administrators should have the mandate to formulate program policies and procedures which safeguard participants' rights, it is not their role to act as an advocate for any other parties in the criminal justice system. Furthermore, to suggest that a program be responsible for challenging any diversion enrollment decision may create for them a conflict of interest if they were in any way involved in denying entrance into the diversion program in the first place.

This Standard contemplates that diversion staffs will defer the decision to challenge any decision rendered against a participant to defense counsel. Whether the decision be initial exclusion or subsequent termina-

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[62] California and New Jersey stand out in this regard, due not only to State-wide drug diversion legislation in both states and a Supreme Court rule in the latter, as well, but to leading Supreme Court cases. *See* Pretrial Intervention Legal Issues, *supra* note 2, at 14 (discussion of *On Tai Ho* and *Leonardis I* cases).

[63] 71 N.J. 85, (1976).

[64] This is the view espoused by the National Advisory Commission on Criminal Justice Standards and Goals. NAC COURTS REPORT, *supra* note 30, at 40-41.

tion, it is properly the role of defense counsel to challenge such determinations if they appear to be arbitrary or capricious.[65]

STANDARD 2.8 Diversion Programs Have An Affirmative Obligation To Ensure That Agreed-Upon Eligibility Guidelines Are Adhered To And Honored By Other Actors In The Diversion Process.

COMMENTARY

While Standard 2.7 *supra*, provides for challenge of a specific diversion decision by defense counsel rather than the staff of any diversion program, this designation of roles does not obviate the duty of diversion programs to verify that guidelines are properly implemented and to press for interagency consultation when they are not. One of the key roles of such a program is to insure that the continuation of such programs is truly in the best interest of all concerned. Monitoring the conduct of all those with a stake in the outcome is one way to insure accountability.

STANDARD 2.9 The Role Of The Prosecutor Is Central To The Eligibility Determination and Enrollment Process. In The Absence Of Statutory Provisions To The Contrary, The Prosecutorial Prerogative To Initiate Diversion Consideration For Particular Defendants Should Be Preserved. Courts Have A Legitimate Role In Monitoring The Fair Application Of Diversion Eligibility And Enrollment Guidelines, Regardless Of Whether Local Law Also Accords The Judiciary An Active Role In the Diversion Enrollment Process.

COMMENTARY

Legal theory aside, as a matter of practical necessity, the prosecutor's role is central to the initiation of diversion eligibility consideration in any given case. The prosecutor alone at this stage of the proceedings is possessed of the necessary facts surrounding the arrest and information on the accused's background from which to assess whether the defendant comes within the ambit of pre-existing diversion eligibility guidelines in his jurisdiction. In this regard, as lawyer for the people, it is he who is required to determine whether probable cause sufficient to sustain a prosecution exists in the case. Thereafter, it is he who is responsible for deciding whether it is in the public interest to proceed with a prosecution

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[65] Whether counsel may challenge such exclusions *via* interlocutory appeal, before his clients case goes to disposition and leads to conviction, or whether a final judgment must first be handed down before an appeal will lie will vary as between jurisdictions. Courts have decided both ways. *Compare People v. Municipal Court of San Mateo County* (known as the case of *On Tai Ho*), 113 Cal. Rptr. 21, (1974) and *Morse v. Municipal Court*, 118 Cal. Rptr. 14, (1974) *with State v. Leonardis* (Leonardis 11), 73, N.J. 360, (1977) and *In Re Richard Cys*, Opinion No. 9625 (D.C. Ct. App., *en banc*, decided 8/9/76).

and, if so, how many and which charges to file.[66] Each of these preliminary processing decisions directly affects whether the diversion option will be applicable in the case in question.

Courts have duly recognized that because of the critical functions vested in the prosecutor which must necessarily be exercised before diversion eligibility consideration can come into play, as a matter of procedural necessity, he is also the appropriate party to make the initial determination whether a particular accused qualifies for diversion.[67]

Nevertheless, it has become a matter of considerable controversy in recent years whether the administration of pretrial diversion is solely a matter for prosecutorial discretion or whether—and if so, to what extent—the courts also have a necessary role to play in the diversion process.[68] Before going further, it must be stressed that this question has not been answered definitively in most states, either through legislation, court rule or test cases. Further, for those few states where the question has been

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[66] The leading federal case upholding the prosecutor's absolute discretion whether or not to charge in a given case is *Powell* v. *Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966), *reh. denied*, 384 U.S. 967 (1968). The Supreme Court has also endorsed the prosecutor's absolute discretion to decide under what statute(s) to proceed with charging. *Kennedy* v. *Rabinowitz*, 318 F.2d 181 (D.C. Cir. 1963), *aff'd*, 376 U.S. 605 (1964). Further, the Court has recognized that by upholding the prosecutor's charging discretion in these ways, this effectively gives him discretion to decide which laws will be enforced. *See Poe* v. *Ullman*, 307 U.S. 497 (1961).

For a thorough discussion of prosecutorial discretion in these respects, *see* Bubany & Skillern, *supra* note 6, at 478-483.

[67] Regardless of whether they thereafter conclude that the judiciary also has a role in the diversion process, all courts which have addressed the issue of diversion eligibility consideration have conceded that the prosecutor's role is central at this stage. *See Sledge* v. *Superior Court*, 113, Cal. Rptr. 28, 31 (1974); *People* v. *Superior Court of San Mateo County* (case of *On Tai Ho*), 113 Cal. Rptr. 21, 27 (1974); *State* v. *Leonardis, Rose, and Battaglia* (known collectively as *Leonardis I*), 71 N.J. 85, (1976); *State* v. *Leonardis* (known as *Leonardis II*), 73 N.J. 360, (1977) (reheard *en banc* solely on the issue of whether a court can compel diversion enrollment of an otherwise eligible defendant over the objection of the prosecutor); *State* v. *Strychnewicz*, 71 N.J. 85, (1976); *United States* v. *James H. Smith*, 354 A.2d 510 (1976); *Walter L. Green, Jr.* v. *United States*, Opinion No. 11640 (D.C. Ct. App., *en banc*, decided 9/7/77), at pp. 1402-03; *People* v. *District Court in and for the County of Larimer*, 527 P.2d 50 (1974) and *Pace* v. *Tennessee*, Crim. Docket No. 53 (Supreme Court of Tennessee, decided *en banc* 5/30/78)

[68] For a discussion of this point, *see, e.g.*, NAC COURTS REPORT, *supra* note 30, at 39-41; PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 2, at 11-16; New Justice, *supra* note 2, at 25-29; Bubany & Skillern, *supra* note 2, at 543. Neielski, *supra* note 4; *1974 House Hearings*, *supra* note 7, at 21 (testimony of Yale Law School Professor Daniel Freed); Bellassai, *supra* note 1, at notes 22-24, 45-47, 63-73, 109-128 and accompanying text.

settled, the conclusions arrived at by policymakers are not uniform. Indeed, they are diametrically opposed in a number of instances.[69]

For the overwhelming number of state and local jurisdictions, diversion program administration, in this as in other respects, has tended to evolve *via* informal, often unwritten, agreements which reflect the power balance of judiciary, prosecutor, and defense bar from one locale to the next and which may, and often do, fluctuate.

The conventional wisdom during diversion's early years on the national scene was to the effect that pretrial diversion was clearly and completely a matter for prosecutorial discretion simply because it occurred at a stage in the processing of a criminal case prior to trial on the merits, and

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[69] *Compare People* v. *District Court in and for the County of Larimer*, 527 *P.2d* 50 (1974) and *United States* v. *James H. Smith*, 354 A.2d 510 (1976) (absent statute to the contrary control of diversion is matter of absolute prosecutorial discretion), *with People* v. *Superior Court of San Mateo County* (*On Tai Ho*), 113 Cal. Rptr. 21 (1974) and *State* v. *Leonardis* (Leonardis II), 73 N.J. 360 (1977) and *Pace* v. *Tennessee*, Crim. Docket No. 53 (Supreme Court of Tennessee, decided *en banc* 5/30/78) (diversion is quasi-judicial activity and, as such, courts have a functional part to play in process, even absent legislative mandate).

In addition to these four state supreme court decisions, lower courts in a number of other states have attempted to come to grips with the issue of whether diversion eligibility determination and enrollment is solely a matter of prosecutorial discretion. These courts, too, have come out on both sides of the question. (To date higher appellate courts in these additional states have made no determinations on the issue.) Because some of these cases were decided on the basis of the presence or absence of a state diversion statute and, if present, particular provisions of such, generalizations about the results reached should be made most cautiously. However, *compare Shade & Mabus* v. *Commonwealth of Pennsylvania Dep't of Transportation*, 394 F. Supp. 1237 (U.S. Dist. Ct., M.D. Pa., 1975) (§1983 civil rights suit alleging Pennsylvania prosecutors' exercise of discretion to exclude certain defendants charged with traffic offenses yet divert others to statewide ARD diversion program is unconstitutionally discriminatory; Court ruled such was completely a matter of prosecutorial discretion) and *Matter of Dillon & Fusco* (Cty. Ct. of Nassau Cty., NY, decided *en banc*, reprinted in Conference Materials, 1976 Annual Conference on Pretrial Release and Diversion (NAPSA and PSRC, May 10-12, 1977) (county court judge abused his discretion when he diverted an otherwise eligible defendant into non-statutory Operation Midway over the objection of the prosecutor, though the court did have the authority to continue cases on the calendar for purposes in the interests of justice), *with State of Washington* v. *Traymor*, Crim. No. 6346 (Superior Ct. of Cowlitz Cty., decided 11/10/77) (county judge *did* have inherent authority to divert otherwise eligible defendant under RCW 9.95A.030 [drug diversion statute] over the objection of the prosecutor), *Brune* v. *Marshall*, Crim. No. 1-276-A-26 (Indiana Ct. App., 1st Dist., decided 7/8/76) (local prosecutor lacked authority to implement a non-statutory diversion program because of no legislative mandate *and* because diversion is a quasi-judicial function and his program made no provision for judicial involvement in the process), and *United States* v. *Gillespire*, 345 F. Supp. 1236 (8th Cir. 1972) (Missouri U.S. Attorney did *not* have the discretion to proceed with criminal indictment against any otherwise eligible narcotics addict already screened by the prosecutor under Narcotic Addict Rehabilitation Act (NARA), 42 U.S.C.A. §§3401, 3412.

because it was a mere extension of the Anglo-American prosecutor's unfettered discretion whether or not to charge in a given case.[70] Thoughtful commentators have concluded in recent years, however, for a variety of reasons, that this view must be rejected as too simplistic. It is not dispositive of the complex questions of law and social policy which arise from the *de facto* overlapping of responsibilities of prosecutor and judge in cases which are adjudicated administratively, as distinguished from those which go to trial.[71]

All who are familiar with the workings of the contemporary criminal justice system know that the textbook division of authority between those who prosecute and those who adjudicate has blurred. As Professor James Q. Wilson aptly notes,

> the role of the courts today is not to determine guilt or innocence, but to decide what to do with persons whose guilt or innocence is not at issue. Our judiciary is organized around the assumption that its theoretical function is its actual one. . . . But most of the time, for most of the cases in our busier courts, the important decision concerns the sentence, not the conviction or the acquittal.[72]

In this regard, it must be remembered that in most large urban court systems, only a small percentage of criminal cases actually go to trial.[73]

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[70] *See, e.g.*, NDAA Monograph, *supra* note 7, at 7; *1974 House Hearings*, *supra* note 7, at 60 (statement of Genessee County, Michigan prosecutor Robert F. Leonard). This view still has its proponents. *See, e.g., 1978 Senate Hearings*, *supra* note 39, (statement of Orleans Parrish, Louisiana District Attorney Harry Connick).

The origins of the American prosecutor's traditional discretion to drop charges after their filing, relied upon by these and other authorities to support the rationale that the administration of pretrial diversion is solely a matter of prosecutorial discretion, stems from the common law authority of the Attorney General of England in this regard. (For a discussion of the origins of this discretion, *see* note, *The Special Prosecutor in the Federal System: A Proposal*, 11 Amer. Crim. L. Rev. 577, 602-607 (1973).)

[71] *See* New Justice, *supra* note 2, at 25-29; Bubany & Skillern, *supra* note 6, at 500-501; Cox, *supra* note 51, at 392-411. The leading New Jersey and California Supreme Court cases supporting an active role for the judiciary in diversion administration echo this view. *See People v. Superior Court of San Mateo County (On Tai Ho)*, 113 Cal. Rptr. 21, (1974), *State* v. *Leonardis, Rose and Battaglia (Leonardis I)* and *State* v. *Strychnewicz*, 71 N. J. 85, (1976); *State* v. *Leonardis, Rose and Battaglia (Leonardis II), reh. en banc*, 73 N.J. 360, (1977).

See generally Miller, F., PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969); Davis K., DISCRETIONARY JUSTICE, (1969); La Fave, *The Prosecutor's Discretion in the United States*, 18 Amer. J. Comp. L. 532 (1970); Comment, *Diversion and the Judicial Function*, 5 PAC. L. J. 764 (1974).

[72] Wilson, J., THINKING ABOUT CRIME 173 (Basic Books, New York, 1975).

[73] National Advisory Commission on Criminal Justice Standards and Goals, A NATIONAL STRATEGY TO REDUCE CRIME 15 (Washington, DC, 1973). To cite a recently documented example, in the city trial court for Washington, DC in 1975, fully 65 percent of all cases (over 12,000 misdemeanors and felonies) did not result in a conviction; 20 percent were screened out at the point of formal filing while another 19 percent were *nolle prosequied* or dismissed after filing but before trial or plea of guilty. Only nine percent of the total cases involved resulted in a sentence of incarceration. DC Bail Agency and Statistical Analysis Center, DC Office of Criminal Justice Plans and Analysis, THE PRETRIAL OFFENDER IN THE DISTRICT OF COLUMBIA, A REPORT ON THE CHARACTERISTICS AND PROCESSING OF 1975 DEFENDANTS 123-124 (Washington, DC, 1977).

Many, usually most, are disposed of administratively—through screening, diversion, or negotiated pleas of guilty, plea "bargains".[74] As a respected team of American University Law School commentators recently noted,

> The low percentage of trials in our criminal justice system has led both the President's Crime Commission and the National Advisory Commission on Criminal Justice Standards and Goals to conclude that much of the criminal process is administrative rather than judicial. Both commissions recognized the administrative nature of criminal case processing as not only desirable but essential.
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> Clearly, conventional adjudication in America today bears little resemblance to the idealized historical model present in the public's eye. By and large, the adjudication process remains a model rather than a reality. Although courts continue formally to maintain their claim for monopoly over criminal trials and adjudications, the greatest number of dispositions result from discretionary decisions by police, prosecutors, and court personnel, including the judges themselves. (Footnotes omitted.)[75]

Though the foregoing amply illustrates that large-scale administrative adjudication generally blurs the roles of prosecutor and judge, how, it must be asked, does this directly affect pretrial diversion, which in most locales today is still conducted without an active role for the judiciary? The widespread phenomenon of plea bargaining at the pretrial stage offers a useful analogy. Like entry into pretrial diversion, the plea "bargain" generally is the end product of a low visibility negotiation between prosecutor and defense counsel.[76] Also, as is typically true for diversion, prosecutorial guidelines for individual assistant district attorneys charged with securing such plea bargains are either non-existent or, if promulgated, kept internal to the prosecutor's office and not published.[77] While it is the predominant view that courts should honor such plea negotiations arrived at *ex parte* between the prosecution and the defense, it is well settled as a matter of law that courts have a vital role to

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[74] NEW JUSTICE, *supra* note 2, at 3.

[75] NEW JUSTICE, *supra* note 2, at 4.

[76] Davis, K., DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 167-170, 188-191 (1969); Jacoby, Bubany & Skillern, *supra* note 6, at 501-502; Lagoy, S., Senna, J., and Siegel, L., *An Empirical Study of Information Usage for Prosecutorial Decision Making in Plea Negotiations* 13 Amer. Crim. L. Rev. 435, 437 (1976).

[77] Jacoby, *supra* note 3, at 62-63, 68; Bubany & Skillern, *supra* note 6, at 429; Thomas, C., and Fitch, W., *Prosecutorial Decision Making*, 13 AMER. CRIM. L. REV. 507, 517-526, (1976) (hereinafter cited as Thomas & Fitch); Note, *Plea Bargaining: The Case for Reform*, 6 UNIV. RICH. L. REV. 325-328 (1974); Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1, 4-25 (1971).

play in reviewing such plea bargains in order to determine their voluntariness.[78] Further, as a matter of law, negotiated pleas of guilty are entered on the record by defendants subject to judicial acceptance of such pleas in open court.[79]

While some commentators would maintain that this analogy does not hold true for pretrial diversion because, unlike plea bargaining, it does not call upon the judiciary to exercise its sentencing authority, others see this distinction as more theoretical than real. For example, as Yale Law School Professor Daniel Freed, a longtime proponent of pretrial reforms, has testified before Congress,

> [t]he Congress should examine with great care the question whether formal pretrial diversion programs are not much more akin to the sentencing powers and procedures of judges than to the traditional role of prosecutors: *i.e.* to judicial decisions prescribing roles over future conduct, rather than to prosecutorial decisions whether to charge a person with a criminal offense, or to prosecute or *nolle* a case after charge or indictment has been filed. Diversion must be recognized for the many essential respects in which it constitutes a pretrial sentence. A person (1) is arrested for a crime, (2) elects not to contest the charge, (3) submits to official supervision and control over his conduct, and (4) is subject to future invocation of criminal charges if he fails to comply.[80]

It is true that the prosecutor's broad discretion whether or not to charge is an inherent feature of Anglo-American law.[81] It is also well settled that absent arbitrariness or capriciousness leading to a denial of due process or equal protection of the laws, the prosecutor's traditional discretion at the charging stage generally is not subject to judicial review.[82] Moreover, as a matter of Constitutional law, the separation of powers between the executive and judicial branches requires that the prosecutor, as representative of the executive, control the process of formal filing of criminal charges and, once filed, control the direction of the state's prosecution.[83] The judiciary, in contrast, is limited to presiding over the course of the trial on the merits in what the Supreme Court recently characterized as a "search for the truth", and, once guilt is adjudicated, to imposing sentence.

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[78] *Boykin* v. *Alabama*, 395 U.S. 238 (1968). *See also Brady* v. *United States*, 397 U.S. 742, 748 (1970). The Supreme Court, in endorsing the widespread use of plea bargaining, has reversed an earlier view and urges that courts take judicial notice of the contents of the plea bargain at the time the plea of guilty is tendered. *See Santobello* v. *New York*, 404 U.S. 257 (1971).

[79] *Santobello* v. *New York*, 404 U.S. 257, 260 (1971).

[80] *1974 House Hearings*, *supra* note 7.

[81] *Powell* v. *Katzenbach*, 359 F. 2d 234 (DC Cir., 1965), *cert. denied*, 384-U.S. 906 (1966), *reh. denied*, 384 U.S. 967 (1968). For a discussion of this point, *see* Cox, *supra* note 51, at 418-423; Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519 (1969).

[82] *See generally Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F. 2d 375, 380 (2d Cir. 1973); *United States* v. *Cox*, 342 F. 2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *Goldberg* v. *Hoffman*, 225 F. 2d 463, 465 (7th Cir., 1955); *United States* v. *Ferguson*, 243 F. Sup. 237 (D.D.C., 1965); *United States* v. *Brokaw*, 60 F. Sup. 100 (C. D. Ill., 1945).

[83] *See* Cox, *supra* note 51, at 423-434; Bubany & Skillern, *supra* note 6, at 481-483.

The highest courts of two states[84] have concluded that pretrial diversion is completely a matter for prosecutorial discretion by basing their decisions on such traditional interpretations of the separation of powers doctrine and the prosecutor's time-honored control over the charging process.[85] However, it is the view of these Standards, as stated in opinions by three other state supreme courts on the subject of diversion[86], that the *realities* of the criminal justice process, as distinguished from the theoretical model outlined above, must provide the central focus when determining whether and to what extent the prosecutor must share with the courts control over the diversion process.

In this regard, courts and legal commentators time and again have pointed out that though the doctrine of separation of powers is easy to state in the abstract, it is often exceedingly difficult to apply in a particular

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[84] Colorado and the District of Columbia. *See People* v. *District Court in and for the County of Larimer*, 527 P. 2d 50 (1974), and *United States* v. *James H. Smith*, 354 A. 2d 510 (1976), respectively.

However, with regard to the District of Columbia, an important *caveat* must be noted. In sustaining the contention of the local U.S. Attorney that administration of the First Offender Treatment (FOT) pretrial diversion program was a matter solely for prosecutorial discretion the D.C. Court of Appeals (which due to the unique jurisdictional nature of the nation's capital is the equivalent of a state supreme court), noted:

> Unlike similar programs in other jurisdictions, this practice is mandated neither by statute nor court rule, and owes its existance and operation solely to prosecutorial discretion.[6] . . . . . .
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> [6]In the normal course, acceptance into the program and the subsequent dismissal of the case are not dependent upon the power of a judge and are administered free from court proceedings. *Compare* diversionary procedures in New Jersey, which must meet the approval of the Supreme Court of New Jersey, N.J.R. Crim. P. 3:28, and in Pennsylvania, which authorize a hearing before a judge on a motion for pretrial diversion. Pa. R. Crim. P. 175, 178.

354 A.2d 510, at note 6 and accompanying text.

However, in a later case having to do with the operation of the Narcotics Pretrial Diversion Project, a separate diversion program also in effect in Washington, the D.C. Court of Appeals took judicial notice of the fact that *this* program, unlike the FOT Program, was operated under D.C. Superior Court sponsorship and functioned pursuant to formal, written interagency understandings between the office of the U.S. Attorney and the local trial court. *See Walter L. Green, Jr.* v. *United States*, Opinion No. 11640 (D.C. Ct. App., *en banc*, decided 9/7/77). The decision in *Green* by the D.C. Court of Appeals (to the effect that a rearrested divertee could be unfavorably terminated if rearrested on probable cause, regardless of whether thereafter convicted or acquitted) relied primarily on the fact that written interagency understandings accorded the prosecutor the discretion so to act, not on an argument that the U.S. Attorney's inherent discretion enpowered it. *Id.* at p. 1404 of Slip Opinion.

Accordingly, the strong argument can be made that the Colorado Supreme Court stands alone in viewing diversion administration *per se* a matter for absolute prosecutorial discretion. The D.C. Court of Appeals, if one reads *Smith* and *Green* together, has *not* held that pretrial diversion is *necessarily* a matter of absolute prosecutional discretion. Rather, that Court has so held *only if* no interagency understandings, statute or court rule works to limit prosecutional control of the process. This would put the view of the D.C. Court of Appeals somewhere between the Colorado Supreme Court, on the one end of the Spectrum, and the New Jersey and California Supreme Courts, on the other end, on the question of inherent authority of prosecutor and judiciary in the administration of pretrial diversion.

[85] 527 P. 2d 50; 354 A. 2d 510.

[86] *On Tai Ho* in California, *Leonardis II* in New Jersey and *Pace* in Tennessee.

context.[87] Indeed, courts have made this point with regard to pretrial diversion.[88] Recent commentators have even challenged the traditional interpretation of what separation of power between executive and judiciary really means.[89] In this regard, one team of writers urges that

> '[s]eparation of powers' is the most frequently cited of the complex reasons which courts advance for refusing to review prosecutorial conduct. Simply stated, the majority of courts hold that the judiciary may not control the legal acts of a prosecutor, a member of the executive branch of government. Since the Constitution allots specific functions to separate branches of government, courts reason that the independence of each branch must be maintained to give meaning to the original scheme.
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> That position requires closer analysis. The original purpose of the division of government functions into independent, coordinated branches of government was to prevent any one branch from exercising unchecked power over the *governed*, and to avoid a consolidation of power in one branch which could operate unreviewed and unchecked. This concept of review as a check upon the exercise of power is implicit in the doctrine of separation of powers, rather than being ruled out by that doctrine.
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> When a court refuses to review a prosecutor's discretionary act, it compromises the reasoning underlying the constitutional theory of 'separation of powers.' So long as it is called discretionary, prosecutors and members of the executive branch can exercise unchecked power which has an impact on the public. (Footnotes omitted.)[90]

Consistent with the above view, a growing body of opinion sees the screening and diversion of classes of cases by prosecutors as beyond and different from the traditional sort of prosecutorial discretion and thus subject to outside review to insure fairness of application.[91] Those so per-

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[87] *See, e.g., People* v. *Superior Court of San Mateo County (On Tai Ho)*, 113 Cal. Rptr. 21, 26-27 (1974); *State* v. *Leonardis, Rose and Battaglia, (Leonardis I)*, 71 N.J. 85, (1976);*State* v. *Leonardis, Rose and Battaglia (Leonardis II), reh. en banc*, 73 N.J. 360, (1976). *See also* discussion of this point in PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 2, at 11-16; Jaszi & Pearlman, *supra* note 11, at 91-94; Cox, *supra* note 51, at 394-403.

[88] *See* discussion of this point in *On Tai Ho, Pace,* and *Leonardis I* and *II, supra* note 87.

[89] Bubany & Skillern, *supra* note 6, at 492-495; Cox, *supra* note 51, at 391-403; Davis, K., ADMINISTRATIVE LAW TREATISE § 1.09 (1958).

[90] Cox, *supra* note 51, at 394-395.

[91] *People* v. *Superior Court of San Mateo County (On Tai Ho)*, 113 Cal. Rptr. 21, 25-26 (1974); *State* v. *Strychnewicz*, 71 N.J. 85, (1976); *State* v. *Leonardis, Rose and Battaglia (Leonardis II)*, 73 N.J. 360 (1977); ALI Model Code, *supra* note 6, § 320.9 Thomas & Fitch, *supra* note 77, at 530-536; Bubany & Skillern, *supra* note 6, at 500-501; Cox, *supra* note 51, at 431-432; *1974 House Hearings, supra* note 7, at 146 (statement of Yale Law School Professor Daniel J. Freed); *1978 Senate Hearings, supra* note 39, at 80-81 (statement of Pretrial Services Resource Center Director Madeleine L. Crohn).

suaded maintain it is incorrect to equate the prosecutor's traditional discretion of whether and what to charge with a procedure whereby the filing and/or active prosecution of certain cases is withheld on condition that the uncharged and/or unprosecuted defendants, still presumed innocent, alter their conduct in specified ways in return for dropping of charges.[92] These commentators see the proper analogy for this process to be not the traditional prosecutorial discretion whether to charge but, the dispensing of tangible benefits (in this case, the dropping of criminal charges) to certain defined classes of persons by a government entity. Seen from this perspective, it is argued that the correct analogy for pretrial diversion is to the rule-making and regulatory functions of government agencies and to the established body of administrative law governing such a process.[93] As such, they argue, it is long settled as a matter of law that courts have a legitimate role to play in reviewing the fundamental fairness of administrative guidelines for receipt of government-sponsored benefits. Courts have a role in monitoring the fair application of such benefits to otherwise eligible recipients in individual cases.[94] In commenting on the nature of judicial review of administrative agency action and the fact that a minority of courts are subscribing to the view that the actions of prosecutors should be similarly reviewable, a recent commentator explains that

> [w]hile the doctrine of separation of powers has been interpreted in such a way as to prevent judicial review of prosecutorial discretion in criminal cases in the majority of courts, it has not consistently been so interpreted with regard to executive action in civil cases. Many executive agencies, particularly federal agencies, are responsible for the enforcement of particular statutes. As a result they have acquired part of the role, if not the title, of the public prosecutor. When courts review such prosecutor-like activity, it can be said they have developed a measure of judicial review 'around the edges of what is traditionally thought of as the prosecutor's office.' . . . while the idea of shared responsibilities for the administration of justice is still a minority view in the criminal law, the theory is generally applicable to administrative agencies. It has been suggested that the results of prosecution and of administrative law enforcement may have the same punitive effects, and that therefore the differences between administrative cases and criminal cases are not sufficient to justify two different standards of review.
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[92] *See, e.g., 1974 House Hearings, supra* note 7, at 146 (statement of Yale Law School Professor Daniel J. Freed); *State* v. *Leonardis, Rose and Battaglia (Leonardis II)*, 73 N.J. 360, (1977) (concurring opinion of Justice Conford).

[93] *See* NEW JUSTICE, *supra* note 2, at 27-29; Cox, *supra* note 51, at 397-402. Bubany & Skillern, *supra* note 6, at 500-505.

[94] *See, e.g., Goldberg* v. *Kelly*, 397 U.S. 254 (1970) and cases cited therein (courts may accord administrative relief to aggrieved welfare recipient where benefits were terminated by government agency without adequate administrative review and opportunity to be heard). For discussion of this area, *see* Cox, *supra* note 51, at 399-401; Davis, K., ADMINISTRATIVE LAW TEXT, § 28.02, at 509-510 (3d. ed., 1972).

> In a few cases in the field of criminal law, courts have adopted a similar line of reasoning: that Congress did not intend prosecutors to determine and apply the law with no limitations to their discretion. The implication is that the use of discretion cannot be totally unreasonable and still avoid review. It is both possible and reasonable that the developments in the field of administrative law may increasingly be held relevant to criminal prosecutions and that judges, observing the parallels, may increasingly be willing to exercise some review of the prosecutor's exercise of discretion such as whether it has a rational basis and whether the prosecutor can provide records supporting his decisions. (Footnotes omitted.)[95]

The highest courts of three states, California, New Jersey, and Tennessee, have in part relied on this rationale to support an active role for the judiciary in the diversion process, not in place of but rather in addition to that of the prosecutor.[96] Subject to the *caveats* and limitations to follow, these Standards take the position that this approach is the better view. The emerging line of California, New Jersey, and Tennessee Supreme Court cases is careful to stress that *initiation* of the diversion eligibility determination process is a legitimate and necessary function of the prosecutor.[97] Moreover, they urge prosecutors to establish *sua sponte* guidelines on diversion eligibility selection and publish them as the more desirable approach than having such imposed by the judiciary.[98] Likewise, these courts urge that avenues for administrative reveiw of eligibility exclusions be established administratively, and only if these are absent or ineffective should the courts be the forum for immediate review.[99]

These cases, consistent with the position taken by leading legal commentators[100], consider the appropriate role for the judiciary in the diversion process to be a limited one. It should be limited, on the one hand, to acceptance on the record of diversion enrollments, to be followed by appropriate continuances, after inquiring to make sure such diversions are

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[95] Cox, *supra* note 51, at 399-400, 401-402.

[96] *People* v. *Superior Court of San Mateo County (On Tai Ho)*, 113 Cal. Rptr. 21, 26-27 (1974); *State* v. *Leonardis, Rose and Battaglia (Leonardis I)* and *State* v. *Strnychnewicz*, 71 N.J. 85, (1976); *State* v. *Leonardis, Rose and Battaglia (Leonardis II), reh. en banc* 73 N.J. 360, (1977) and *Pace* v. *Tennessee*, Crim. Docket No. 53 (Supreme Court of Tennessee, decided *en banc* 5/30/78).

[97] *See, e.g., Sledge* v. *Superior Court*, 113 Cal. Rptr. 28, 29-31 (1974); *People* v. *Superior Court (On Tai Ho)*, 113 Cal. Rptr. 21, 24-27 (1974); *State* v. *Strychnewicz*, 71 N.J. 85, (1976); *State* v. *Leonardis, Rose and Battaglia (Leonardis II)*, 43 N.J. 360, (1977) and *Pace* v. *Tennessee*, Crim. Docket No. 53 (Supreme Court of Tennessee, decided *en banc* 5/30/78).

[98] *See, e.g., State* v. *Strychnewicz*, 71 N.J. 85, (1976); *State* v. *Leonardis, Rose and Battaglia, (Leonardis II)*, 73 N.J. 360, (1977). *See also Harvey* v. *Superior Court*, 43 Cal. App. 3d. 66, (1974) and *Pace* v. *Tennessee*, Crim. Docket No. 53 (Supreme Court of Tennessee, decided *en banc* 5/30/78).

[99] *See, e.g., State* v. *Leonardis, Rose and Battaglia (Leonardis II)*, 73 N.J. 360, (1977) and *Pace* v. *Tennessee*, Crim. Docket No. 53 (Supreme Court of Tennessee, decided *en banc* 5/30/78).

[100] *See* notes 89 and 91, *supra*, and accompanying text.

voluntary and consistent with established guidlines.[101] On the other hand, they view the court as the ultimate forum for redress of arbitrary or discriminatory exclusions from diversion, but only after available avenues of administrative review below have been exhausted first.[102] All agree, courts and commentators, that the burden of proof that allegedly aggrieved defendants excluded from diversion consideration must meet in order to trigger judicial review should, as a matter of policy, be a rigorous one.[103]

The California, New Jersey, and Tennessee Supreme Courts, in carving out a role for the judiciary in the diversion process not directly dependent on statute or court rule, respectively, weave in with the above rationale the view that because diversion is a *quasi-judicial* function (*i.e.*, akin to sentencing), it therefore falls within the sphere of authority of the courts.[104] This view must be given great weight when diversion enrollment occurs *post-charge, i.e.* after jeopardy has attached *via* the filing of formal charges. This is so because as a matter of law, the prosecutor's role, once charges are lodged, is advisory to that of the judiciary insofar as adjudication of the case and sentencing is concerned.[105] On the other hand, where diversion enrollment occurs pre-charging, as in many jurisdictions, it has been argued that this rationale for including the courts as an active participant disappears, because the court's jurisdiction is not invoked until charges are formally filed.[106]

While this distinction supports the argument that pre-charge diversion is wholly a matter of prosecutorial discretion, it is the view of these Standards that a labelling theory should not be dispositive on this point. Thus, pegging an active role for the judiciary in the diversion process on terms such as "quasi-judicial" is no more acceptable than excluding the

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[101] *People* v. *Superior Court (On Tai Ho)*, 113 Cal. Rptr. 21, 25-27 (1974); *State* v. *Leonardis, Rose and Battaglia*, 73 N.J. 360, (1977); ALI Model Code, *supra*, note 6, § 320.5; NAC COURTS REPORT, *supra* note 30, at 39-40; PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 2, at 13-15; *1978 Senate Hearings, supra*, note 70, at 80-81 (statement of Pretrial Services Resource Center Director Madeleine L. Crohn); Thomas & Fitch, *supra* note 77, at 542.

[102] *See, e.g., State* v. *Strychnewicz*, 71 N.J. 85, (1976), *State* v. *Leonardis, Rose and Battaglia (Leonardis II)*, 73 N.J. 360, (1977) and *Pace* v. *Tennessee*, Crim. Docket No. 53 (Supreme Court of Tennessee, decided *en banc* 5/30/78).

[103] *See, e.g., State* v. *Leonardis, Rose and Battaglia (Leonardis II)*, 73 N.J. 360, (1977); ALI Model Code, *supra* note 6, at §320.9(1), (2); Bubany & Skillem, *supra* note 6, at 503-505. *Pace* v. *Tennessee*, Crim. Docket No. 53 (Supreme Court of Tennessee, decided *en banc* 5/30/78)

[104] *See, e.g., People* v. *Superior Court (On Tai Ho)*, 113 Cal. Rptr. 21, 25-27 (1974); *Walter L. Green, Jr.*, v. *United States*, Opinion No. 11640 (D.C. Ct. App., *en banc*, decided 9/7/77) at p. 6 of slip opinion; *State* v. *Leonardis, Rose and Battaglia (Leonardis II)*, 73 N.J. 360, (1977) and *Pace* v. *Tennessee*, Crim. Docket No. 53 (Supreme Court of Tennessee, decided *en banc* 5/30/78).

[105] *People* v. *Superior Court (On Tai Ho)*, 113 Cal. Rptr. 21, 25-27 (1974); *State* v. *Leonardis, Rose and Battaglia (Leonardis II)*, 73 N.J. 360, (1977); PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 2, at 11-14; Jaszi & Pearlman, *supra* note 11, at 91-92.

[106] *Ibid.*

judiciary by reliance on "separation of powers" and "prosecutorial discretion." Rather, by primary reliance on the administrative law analogy described above, distinctions between pre- and post-charge diversion enrollment become inapposite when attempting to answer the question what role the courts should play in reviewing prosecutor actions in the area of diversion eligibility determination.

STANDARDS

3.1 Diversion Programs Should Utilize Individualized and Realistic Service Plans Which Feature Achievable Goals. Service Plan Formulation Should Occur As Soon As Possible After Initial Contact With The Participant And In Consultation With Him.

3.2 Service Plans Should Address Specific Needs Of The Divertee And Not Be Designed Merely To Accommodate The Crime Charged. The Duration Of The Service Plan Should Not Exceed The Authorized Sentence For The Crime Charged.

3.3 Service Plan Requirements Should Be The Least Restrictive Possible To Achieve Agreed-Upon Goals And Should Be Structured To Help The Divertee Avoid Behavior Likely To Lead To Future Arrests.

3.4 Restitution And Volunteer Community Service Should Be Included In Service Plans Only When Such Components Are Certain To Enhance The Overall Goals Of An Individual Plan.

3.5 Service Plans Should Be Revised When Necessary. No Additional Requirements Should Be Sought Unless Necessary To Achieve The Goals Originally Agreed Upon. Any Modifications Should Be Fixed Only After Consultation With And Agreement By The Participant.

STANDARD 3.1 Diversion Programs Should Utilize Individualized And Realistic Service Plans Which Feature Achievable Goals. Service Plan Formulation Should Occur As Soon As Possible After Initial Contact With The Participant And In Consultation With Him.

COMMENTARY

Since participation in diversion must be voluntary on the part of the defendant, it is necessary to devise a service plan at the earliest possible stage. The participant should directly confer in the formulation of the plan. This practice is recommended for a variety of reasons.

Should the newly-enrolled divertee not realize at the outset what will be expected of him, staff energies are likely to be wasted on false starts and

the process of establishing essential counselor-counselee rapport impaired.[1] Cooperation problems and possible termination situations which would jeopardize successful diversion could arise. Such adverse situations could be caused by early misunderstandings.

As is discussed in Standard 3.2, *infra*, service delivery will differ from one individual to the other, although it should be in keeping with the general parameters of the diversion option, as presented at the time of the enrollment decision. These standards do not underestimate the fact that time is necessary to establish a relationship of trust between participant and diversion program staff and to elicit background information necessary to formulate a service plan. Moreover, the details of such service plans may be affected by new insights or developments at a later stage. It is suggested that a clear definition of the service plan agreement be developed as soon as possible upon entry and that the diversion program's policy be to formulate early service plans.[2]

Again, in keeping with the voluntary enrollment aspect of the program and the presumption of innocence, it is essential that the divertee be actively involved in the formulation of such plan. In order to accomplish their mandate, service plans should be viewed by participants as tools to help in their specific situations rather than as punishment, substitute sentence, or imposed conditions to be gotten around. While service plans will often place requirements on the participant such as attendance at a certain number of counseling sessions, these requirements should all be geared toward the individualized needs of the participant in question, such as vocational training, for example, with the participant cognizant of such purposes.[3]

The service plan should, in addition, encompass only those goals which can be achieved realistically by the divertee within the standard time frame of the diversion program and which will be reflective of that divertee's needs and abilities. Unrealistically demanding service plans are likely to fail. The participant who is unable to complete the program due to failure to adhere to his service agreement is likely to be returned to court for renewed prosecution.

STANDARD 3.2 Service Plans Should Address Specific Needs Of The Divertee And Not Be Designed Merely To Accomodate The Crime Charged. The Duration Of The Service Plan Should Not Exceed The Authorized Sentence For The Crime Charged.

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[1] *See* Standards 1.1, 2.3, 2.4, 2.6 and 5.1, *infra*, and accompanying commentary.

[2] *See* Fitzgerald, D., SERVICES I: DEVELOPING THE SERVICE CONTRACT IN PRETRIAL DIVERSION PROGRAMS, (Pretrial Services Resource Center, Washington, DC 1978) (in press) (hereinafter cited as Fitzgerald).

[3] Fitzgerald, *supra* note 2; Zaloom, J., *Pretrial Intervention Under New Jersey Court Rule 3:28 Proposed Guidelines for Operation*, CRIMINAL JUSTICE QUARTERLY, Vol. 2, No. 4 (Fall, 1974), reprinted by ABA Pretrial Intervention Service Center as *Pretrial Intervention Article Reprint No. 2*, at 16-17 (January, 1975) (hereinafter cited as Zaloom).

COMMENTARY

The terminology used in this chapter is of particular importance. "Service plan" is being recommended as opposed to "treatment", "counseling", "cures", or "rehabilitative models". Given the vast range of eligible defendants, any labeling which could ultimately stigmatize their participation in a diversion program is self-defeating. As a key commentator has aptly noted, "[a]s entrance into diversion programs is determined by more institutionalized and formal procedures, the risk that diversion programs will develop a stigma of their own may increase."[4]

One should reflect on the experience of juvenile courts which were created in the hopes of avoiding for youths the stigma of criminal justice processing. Yet, processing through the juvenile courts has developed a stigma of its own, a danger which could apply to diversion.[5] To presuppose that all diverted defendants need treatment is to apply to all, whether they need it or not, an undifferentiated approach which leads to another type of overreach.[6]

It is axiomatic that personal characteristics of diversion participants will vary, as will the nature of the offenses with which they are charged. Most pretrial service practitioners, as others in helping services, are of the view that programs should respond to the personal needs of the defendant rather than treat him for the crime which was allegedly committed.[7] Not only is this approach mandated for pretrial diversion because the divertee is still presumed innocent of the offense charged, but because the premise on which such programs operate is that by addressing socio-economic, educational, and health needs of the divertee, future conduct likely to lead to arrest situations can be obviated.[8] The New Jersey Supreme Court in its landmark diversion decision, *State* v. *Leonardis*,[9] was cognizant of this important distinction when it stated in important *dicta* that "conditioning admission [to a diversion program] solely on the nature of the defendant's crime may be both arbitrary and illogical."[10]

Adherence to a model of providing services based on the personal needs of defendants means offering unemployed or employment-handicapped defendants aptitude achievement testing, vocational counseling,

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[4] Gorelick, J., *Pretrial Diversion: The Threat of Expanding Social Control*, 10 HARVARD CIV. RTS.—CIV. LIB. L. REV. 198 (1974) (hereinafter cited as Gorelick). *See also Hearings on § 1819, The Federal Criminal Diversion Act of 1977, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 96th Cong., 2d Sess. (1978) at 80 (statement of Pretrial Services Resource Center Director Madeleine L. Crohn) (hereinafter cited as Crohn).

[5] On this point, *see* Gorelick, *supra* note 4, at 198, Crohn, *supra* note 4, at 80; and Nejelski, P., *Diversion: The Promise and the Danger*, CRIME & DELINQUENCY, Vol. 22, No. 4 (October, 1976) at 402 (hereinafter cited as Nejelski).

[6] Gorelick, *supra* note 4, at 200-203; Zaloom, *supra* note 3, at 16-17; Crohn, *supra* note 4, at 83.

[7] Zaloom, *supra* note 3, at 16-18; Gorelick, *supra* note 4, at 200-202; Crohn, *supra* note 4, at 80-82.

[8] Zaloom, *supra* note 3, at 15-16; Crohn, *supra* note 4, at 77-78.

[9] 71 N.J. 85 (1976).

[10] *Id.* at 90.

job training to develop the skills necessary to obtain and retain a job, and job placement that puts the defendant in employment commensurate with his abilities.[11] As another example of individually-tailored service delivery, consider the youthful defendant. Broad-based educational services, including remedial education, might be appropriate.[12] For female defendants, key services could well include access to day care facilities and adjustment of program counseling hours to correspond to a woman's work or home responsibilities.[13]

Beyond these basic services, a good, comprehensive, multi-service program should provide services directly and act as a referral agency as well, matching defendants with other services in the area. Programs should offer defendants who need it personal counseling and psychological testing, either directly through the program or through referrals to outside agencies. As a result, program participants can receive assistance tailored to their specific needs, whether group therapy, individual therapy, vocational rehabilitation, family and/or individual counseling, emergency financial aid, assistance in housing, welfare, medical, or legal matters, and so forth.[14]

The above should not be construed to mean that the fact of arrest is irrelevant to the service plan. Common to all participants is the experience of the arrest and the exposure to the preliminary stages of criminal processing. As one prominent diversion commentator has pointed out, "[e]ach participating defendant has, as indicated by his or her arrest, a problem or set of problems which caused the involvement in the criminal process. Each is subject in addition to the anxiety produced by the threat of ordinary prosecution."[15] In addition, the particular facts and circumstances surrounding the arrest will differ among defendants.

As will often happen in one-to-one sessions where a relationship of trust is developed between counselor and participant, the divertee will want to discuss the incident leading to the arrest.[16] So long as the ultimate integrity of individualized service plans is safeguarded, such plans should reflect an awareness of the offense charged and contain a strategy to cope with the conduct which led to the divertee's arrest. Thus, a divertee charged with a property crime might receive vocational/employment assistance, while another whose arrest suggests the presence of emotional problems could, instead, most immediately benefit from psychological referrals. While this approach is recommended here, the fundamental tenets of Standard 3.3 must be kept in mind.[17]

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[11] Zaloom, *supra* note 3, at 14, 17; Fitzgerald *supra* note 2.

[12] Fitzgerald, *supra* note 2.

[13] Fitzgerald, *supra* note 2.

[14] Zaloom, *supra* note 3, at 17; Fitzgerald, *supra* note 2; Crohn, *supra* note 4, at 79, 80, 83.

[15] Zaloom, *supra* note 3.

[16] *Id.* at 22.

[17] *See* Zaloom, *supra* note 3, at 17; Crohn, *supra* note 4, at 79, 82, 83.

In addition, the offense for which the divertee was arrested should be considered in order to ensure that service plan periods are not substantially longer than the sentence that is generally imposed for that offense following conviction.[18] Programs should also keep in mind that police and prosecutors may overcharge to induce plea-bargaining.[19] As a result, charges facing the defendant who enters the diversion program could well be more numerous or serious than those he would have actually been tried for if the case for which he was arrested had gone through the full adversary process.[20]

STANDARD 3.3 Service Plan Requirements Should Be The Least Restrictive Possible To Achieve Agreed-Upon Goals And Should Be Structured To Help The Divertee Avoid Behavior Likely To Lead To Future Arrests.

COMMENTARY

These Standards support the premise that the major objective of any service plan is to help the individual divertee avoid future crisis situations which might lead to arrest. In designing service plans, program staff must keep in mind that the level and intensity of service required will vary from one participant to the next. As a noted researcher and evaluator who has surveyed many diversion programs has concluded "... the vast majority of their participants [are] from defendant groups that face little punishment in the criminal justice system [and] who probably need not be accompanied by extensive rehabilitation."[21]

As a result, certain participants may need little more than supervised reporting (in person or by telephone) once the necessary assessment has been made. Service delivery and program requirements which go beyond the general purpose cited above may be an invasion of privacy and lead to serious questions of due process and equal protection. As a leading diversion practitioner has written, "It is neither the duty nor the right of criminal justice agencies to require behavioral change or rehabilitation beyond that necessary for such deterrance."[22]

The commentator went on to stress that

> ... the mere fact of arrest and the securing thereby of control over the life of a defendant cannot mean that problems unrelated causally to the alleged offense should be the subject of treatment or rehabilitative services. A

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[18] Zaloom, *supra* note 3, at 24-25; Crohn, *supra* note 4, at 82.

[19] *See generally* Thomas, W., *Plea Bargaining: The Clash Between Theory and Practice*, 20 Loyola L. REV. 303 (1974); Dash, S., *Cracks in the Foundation of Criminal Justice*, 46 Ill. L. REV. 385 (1951); *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519 (1969); Mills, R., *The Prosecutor: Charging and Bargaining*, 1966 UNIV. ILL. L. F. 511 (1966).

[20] *See* Standards 1.1 and 1.2, *infra*, and accompanying *Commentary*.

[21] Zimring, F., *Measuring the Impact of Pretrial Diversion from the Criminal Justice System*, 41 UNIV. CHI. L. REV. 224, (1974).

[22] Zaloom, *supra* note 3, at 16.

homosexual defendant charged with embezzlement should not as a result of PTI enrollment be required to undergo "treatment" for homosexuality.[23]

Another area which requires safeguards relates to individuals whose personal situation is such that intensive services are needed. In these situations it is recommended that service plans include referrals for long-range service delivery. Defendants with hard drug and other substance abuse problems or with serious emotional problems clearly fall within the category. Completion of the program in these situations would not require that all problems be resolved; rather, the defendant's situation could be sufficiently ameliorated to give him the stability required to avoid future crises.

STANDARD 3.4 Restitution and Volunteer Community Service Should Be Included In Service Plans Only When Such Components Are Certain To Enhance The Overall Goals Of An Individual Plan.

COMMENTARY

One increasingly common aspect of diversion program plans requires particular attention; that of monetary restitution or community service. These Standards support the premise that restitution or community service may, in limited circumstances, be an acceptable adjunct so long as they are not pre-conditions of program eligibility and are included in the service plan in fulfillment of goals expressed in Standard 3.3, *supra.*

As suggested in Standard 1.3, diversion has elements of coercion, however cautious the guidelines and sophisticated the legal safeguards.[24] If restitution were required in all cases, many defendants would agree to make restitution simply in order to enroll and escape prosecution. [25] The program would then be in jeopardy of becoming a monetary collection agency for the criminal justice system rather than a service delivery and supervision mechanism aimed at assisting its clientele in developing more functional behavior patterns.[26] While an understanding on the part of the divertee of why and how his behavior led to the arrest is often a goal of and an achievement flowing from the service plan, the payment of monetary restitution may or may not contribute to such personal growth and awareness, depending on the individual divertee and the facts and circumstances surrounding the arrest.[27]

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[23] *Ibid.* This point is also forcefully stressed by other leading commentators. *See, e.g.,* Gorelick, *supra* note 4, at 212; Crohn, *supra* note 4, at 80; Aaronson, D., *et. al.,* THE NEW JUSTICE: ALTERNATIVES TO CONVENTIONAL CRIMINAL ADJUDICATION 17-21, 25 (1977).

[24] Almost every national study and legal commentator who has looked carefully at the diversion process has come to this conclusion. *See* citations and references contained in note 33, *Introduction,* and note 31, *Chapter I, infra.*

[25] Zaloom, *supra* note 3, at 21-22; Crohn, *supra* note 4, at 81-82.

[26] Crohn, *supra* note 4, at 81.

[27] Zaloom, *supra* note 3, at 22.

An important consideration in deciding whether to attach a restitution component to pretrial diversion centers around the makeup of the defendant population being diverted *vis a vis* general community *mores*. In homogeneous communities where criminal defendants tend to mirror the makeup of the broader population in terms of ethnicity, socio-economic status and value systems, restitution for selected divertees might enhance the effectiveness of the diversion program and generate widespread community support.[28] On the other hand, where, as in the nation's large urban centers, the majority of the criminally accused are the poor, the unemployed and minorities, imposition of monetary restitution by the criminal justice system could have a destructive effect and lead to suspicion of and opposition to the diversion program by various sectors of the population.[29]

Regardless of community makeup, when requiring restitution in service plans for indigent participants, the use of symbolic or partial restitution or restitution in small installments should be favored. In addition, when utilizing restitution, the diversion program should work through the participants' attorneys when discussing the restitution amount and payment schedule with the victim.[30]

The use of unpaid community work as a service plan device in the post-conviction probation setting has gained in popularity. (A well known program is the Alternative Community Service Program, Multnomah County Court, Portland, Oregon.) More recently, the concept has been tried in various pretrial diversion programs.[31] As one diversion commentator has written,

> [h]aving defendants do volunteer work is appealing; charitable organizations, especially, need volunteers; the "offender's" unpaid contribution to the community satisfies the need to *punish* him/her—it is similar to but better than a pretrial fine. For the defendant, volunteer work is not an unpleasant or humiliating way to earn the dismissal of charges.
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> But in the pretrial setting, because of the coercive aspect of PTI [diversion], the possibility of challenge to such work assignments on XIIIth Amendment grounds must be considered. Proper safeguards could prevent such attack:
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> 1. Unpaid work should, as with restitution, be used only for its therapeutic value and not substituted for defendant-focused treatment in order to fill a need for volunteers.

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[28] *Ibid.*

[29] *Ibid.*

[30] For a thorough discussion of the legal issues inherent in the routine utilization of restitution in pretrial diversion, *see* ABA Pretrial Intervention Service Center, PRETRIAL INTERVENTION LEGAL ISSUES: A GUIDE TO POLICY DEVELOPMENT 33-34 (Washington, D.C., 1977) (hereinafter cited as PRETRIAL INTERVENTION LEGAL ISSUES).

[31] *See* PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 30, at 35 for a discussion of some of the ramifications from the use of affirmative work service in the diversion context.

2. Voluntary work should be freely chosen by the participant as an alternative to, or in addition to, other appropriate treatment: counseling, supervision, *etc.* The particular kind of volunteer work should be the defendant's choice, and he/she should understand that unpaid work may be rejected without penalty of denial of enrollment.

3. Unpaid work might be made a condition of PTI enrollment, however, where (a) the work is directly related to the alleged offense: cleaning up a park for a charge of littering a park. This is restitution, and the value of the free labor may exceed the damages. (b) Where the work assignment has direct therapeutic value in relation to the alleged offense which outweighs the unpaid-labor aspect: assignment of an accused drug-dealer to work in a narcotic detoxification program to learn the effects of drug trafficking. (c) Where the volunteer assignment has indirect therapeutic value not otherwise available. For a defendant with no employment skills, a volunteer position might teach basic work habits. Such work could adequately substitute for an OJT program where none is available.[32]

Whenever monetary or symbolic restitution or community work service are under consideration as adjuncts to pretrial diversion, attention must be given to whether such techniques are also features of the post-conviction, correctional alternatives in operation. Requiring restitution or work service from pretrial divertees who have yet to be convicted while not requiring such conditions of at least equally sizeable categories of convicted and sentenced defendants would be suspect. In such circumstances, imposition of these processes at the pretrial stage should be vigorously opposed.

STANDARD 3.5 Service Plans Should Be Revised When Necessary. No Additional Requirements Should Be Sought Unless Necessary To Achieve The Goals Originally Agreed-Upon. Any Modifications Should Be Fixed Only After Consultation With And Agreement By The Participant.

COMMENTARY

The service plan may change in its particulars as the divertee progresses or as new needs or problems arise. Moreover, as the relationship of trust and confidence between diversion staff and the participant evolves, previously undetected personal needs of the divertee may become apparent. Since the service plan was a collaborative effort between new enrollee and diversion staff at or just after point of intake (and often thereafter presented to the prosecutor and/or court for endorsement), substantial changes to its terms should not be made lightly.

More demanding restrictions, especially, should not be added without the defendant's consent. If the defendant is enrolled in the program with

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[32] Zaloom, J., "Some Legal Problems in Treatment Programming," an unpublished paper presented at the Pretrial Intervention Workshop, Princeton University, February 14, 1976 (available from the author on request).

the expectation that he will have to meet certain requirements and then the program later, without consent, adds restrictions, the voluntariness of the diversion process may be thwarted. In the event that the divertee objects to service plan modifications viewed as essential by the diversion program, he should always have the option to withdraw and return for ordinary prosecution without prejudice.[33] If all parties view the service plan as a dynamic, helping process, then reasonable addition of new requirements is likely to be agreeable to the defendant.

When more demanding requirements are made by the program, court or prosecutor, after changed circumstances and in good faith, and the defendant does not agree, the program should then move administratively to terminate the participant and return him for prosecution without prejudice. The defendant should have the right to a hearing on his termination, however,[34] and in this instance should be allowed to present the issue of more demanding requirements to the hearing officer for resolution. Such administrative resolutions should be infrequent; the rule should be in-house adjustment of such matters, preferably between divertee and staff, in the context of program participation.

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[33] Crohn, *supra* note 4, at 82. *See* Standard 5.1, *infra*, and accompanying commentary.

[34] This requirement for a pre-termination hearing is recommended elsewhere in these Standards, as well as by all major commentators who have addressed the issue. *See* Standards 5.2, 5.4, 5.5, *infra*, and accompanying notes and commentary.

STANDARDS

4.1 Program Policy Should Provide For A Dismissal With Prejudice Upon Successful Completion Of Program Requirements.
4.2 A Diversion Program Should Limit The Information Provided To The Court Or Prosecutor To That Which Is Necessary To Verify That Program Requirements Were Met And That The Service Plan Was Addressed Satisfactorily.
4.3 It Should Be The Responsibility Of Defense Counsel To Challenge Prosecutorial Or Court Refusal To Dismiss Charges Where Program Requirements Have Been Met. It Should Be The Responsibility Of The Diversion Program To Insure General Enforcement Of Dismissal Agreements.
4.4 Records Relating To Arrest, Diversion Participation, And Final Disposition Should Be Sealed Upon Successful Completion Of The Diversion Program. Criminal Justice Personnel Should Be Permitted Access To Such Records Solely To Determine Whether A Diversion Candidate Has Previously Been Diverted.

STANDARD 4.1 Program Policy Should Provide For A Dismissal With Prejudice Upon Successful Completion Of Program Requirements.

COMMENTARY

Pretrial diversion is advocated in these Standards as an alternative to traditional prosecution in the criminal justice system. It is presented as a structured process enabling selected defendants to have a chance at self-improvement in order to avoid behavior likely to lead to further arrests and, by so doing, to give them an early exit from the system. As a result, this Standard takes the position that successful outtake should be accompanied by a dismissal with prejudice upon completion of program requirements. To offer anything less leaves the door open for further prosecution. Successful completion of the program without dismissal

makes pretrial diversion no alternative to prosecution at all, merely an interim step which may or may not lead to sentencing regardless of behavior during the program.[1]

Many commentators have argued that the decisions to divert and to reward participants upon successful completion are solely those of the prosecutor; as a result, the final disposition to be entered in a diverted case (if the defendant complies with program requirements) is necessarily a *nolle prosequi*.[2] This philosophy is reflected by the widespread use of the *"nolle"* in many pretrial diversion programs, particularly those operated under the auspices of the prosecutor's office. Since entry of a dismissal is, as a matter of law, a judicial act, programs which do not involve the court as an active participant in the diversion process may have to accord the successful divertee a disposition that falls short of dismissal with prejudice.[3]

While these Standards in no way impugn the good faith of prosecutors who enter a *nolle prosequi* in a diverted case, legally there is no bar to bringing the *nolle prosequied* charges at a later time against the same defendant.[4] It is for this reason that these Standards advocate only the entry of a final dismissal with prejudice in the diverted case upon completion of the program requirements. It must be remembered that only dismissal

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[1] This point was forcefully made by the National Advisory Commission on Criminal Justice Standards and Goals in 1973. *See* National Advisory Commission on Criminal Justice Standards and Goals, REPORT ON THE COURTS 27-28 (Washington, DC 1973) (hereinafter cited as NAC COURTS REPORT).

[2] *"Nolle prosequi"* is defined as ". . . a formal entry upon the record by . . . the prosecuting officer in a criminal action . . . by which he declares that he 'will no further prosecute' the case, either as to some of the counts, or some of the defendants, or altogether." Black's Law Dictionary, 1198 (fourth rev. ed.) (West, fourth rev. ed., 1968) (hereinafter cited as Black's). *See generally* Emery, T., *The Nolle Prosequi in Criminal Cases*, 6 ME. L. REV. 199 (1913); Comment, *Nolle Prosequi in Connecticut*, 4 CONN. L. REV. 117 (1971).

[3] *See* ABA Pretrial Intervention Service Center, PRETRIAL INTERVENTION LEGAL ISSUES, A GUIDE TO POLICY DEVELOPMENT 11-16 (Washington, DC, 1977) (hereinafter cited as PRETRIAL INTERVENTION LEGAL ISSUES); Pearlman, S., LEGAL ISSUES IN ADDICT DIVERSION: A LAYMAN' S GUIDE 36-38 (Drug Abuse Council, Inc., and ABA Corrections Commission, 1974) (hereinafter cited as Pearlman).

[4] *See* note 2, *supra*. The extent to which *"nolled"* charges are in fact brought back at a later date for renewed prosecution is problemmatic. Though there exists little literature on the point, those familiar with the workings of any local criminal justice system are aware of certain situations where, as a matter of policy, prosecutors will re-file *"nolled"* charges. For example, where an offense is initially papered by the prosecutor as a misdemeanor but, because of additional evidence in the case or the discovery of added crimes, it later is decided instead to prosecute the initial case as a felony, in most jurisdictions the misdemeanor charge(s) will be *nolled* and an indictment sought or felony information filed as to the same offense. Other situations can conceivably arise where the prosecutor concludes that a given individual is a dangerous criminal against whom the full weight of prosecution, on any and all available grounds, should be directed. Previously *nolled* cases could thereupon be refiled. *See generally* Johnson, T., *Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. L. & C. 157 (1974); Pound, R., *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U.L. REV. 925 (1960).

with prejudice would bar reprosecution on double jeopardy grounds as well as *res judicata*.[5] Entry of a dismissal without prejudice has the same defects as the *nolle prosequi*.[6] The National Advisory Commission on Criminal Justice Standards and Goals is in accord on this issue and has advanced the same rationale as expressed here.[7] In addition, it would seem that fundamental fairness requires entry of dismissal with prejudice. A participant in a diversion program who successfully completes that program has kept his part of the bargain and should be able to consider the matter closed and final and be able to plan on that basis without fear that the matter will arise again.

These Standards take the position that completion of program requirements should trigger the entry of the dismissal. While these Standards do not define what such routine program requirements should be and while they will vary somewhat from jurisdiction to jurisdiction depending on local circumstances, some consensus does seem to exist as to what should constitute basic program requirements. First, for pretrial diversion to have any meaningful impact, contact with some degree of frequency between program staff and the divertee is generally necessary. Accordingly, diversion normally requires a divertee to keep scheduled appointments with program staff and keep the staff aware of where he may be contacted while enrolled.[8] In addition, diversion programs uniformly require divertees to avoid situations which may lead to rearrest.[9] The third general requirement for successful diversion is the existence of a modicum of

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[5] Dismissal with prejudice, which by its nature is a judicial ruling, is defined as "an adjudication on the merits, *and final disposition*, barring the right to bring back or maintain an action on the same claim or cause . . .. It is *res judicata* as to every matter litigated." (Emphasis added.) Black's, *supra* note 2, at 555. *Res judicata* is defined, in turn, as "a matter adjudged; a thing judicially acted upon or decided . . .. Rule (of law) that final judgment or decree on the merits by a court of competent jurisdiction is conclusive of the rights of the parties . . . in all later suits on points and matters determined in the former suit." *Id.* at 1470.

[6] This is the case because, though it is a judicial ruling as distinguished from a prosecutorial one, a dismissal without prejudice allows "the complaintant to sue again on the same cause of action. The effect of the words 'without prejudice' is to prevent the decree of dismissal from operating as a ban to a subsequent suit." *Id.* at 566.

[7] "Upon expiration of the (diverson) agreement, *the court* should *dismiss* the prosecution *and no future prosecution based on the conduct underlying the initial charge should be permitted.*" (Emphasis added.) NAC COURTS REPORT, *supra* note 1, Standard 2.2, Procedure for Diversion Programs, §6, at p. 39.

[8] *See* Vera Institute of Justice, PROGRAMS IN CRIMINAL JUSTICE REFORM 84 (1972) (hereinafter cited as Vera Report); Nimmer, R., DIVERSION: THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION 102 (1974) (hereinafter cited as Nimmer); Abt Associates, Inc., PRE-TRIAL INTERVENTION: A PROGRAM EVALUATION OF NINE MANPOWER-BASED PRE-TRIAL INTERVENTION PROJECTS, FINAL REPORT 79-80 (U.S. Dept. of Labor, 1974) (hereinafter cited as Abt Report).

[9] Abt Report, *supra* note 8, at 79; Mullen, J., THE DILEMMA OF DIVERSION: RESOURCE MATERIALS ON ADULT PRE-TRIAL INTERVENTION PROGRAMS 26 (LEAA, 1975).

cooperation between the defendant and the program in addressing his own needs. The service plan should reflect these needs.[10] It is realized, of course, that a divertee who does not achieve all the goals stated in his service plan has not necessarily been uncooperative with the diversion program in a way that warrants unfavorable termination. A divertee who has consistently missed scheduled appointments with the program staff, however, might be deemed not to have met the requirements of the program. On the other hand, a divertee who has kept in regular contact with the staff, but, for example, fails to obtain the Graduate Equivalency Degree (GED) provided for in his service plan might well be considered to have complied with the program requirements. To require achievement of service plan goals as program completion criteria *per se*, it has been suggested, "may well be asking the courts to add social performance criteria to definitions of criminal conduct."[11]

STANDARD 4.2 A Diversion Program Should Limit The Information Provided To The Court Or Prosecutor To That Which Is Necessary To Verify That Program Requirements Were Met And That The Service Plan Was Addressed Satisfactorily.

COMMENTARY

Criminal justice officials who make decisions whether to drop charges after program completion on the basis of program recommendations—whether it be judges or prosecutors—must have comprehensive but concise information. Facts and opinions not essential to that decision, however, should not be included in such reports.

The final report should, of course, reiterate basic program requirements and specify to what extent they were met. In addition, a brief summary should be submitted outlining the goals contained in the service plan and how and to what extent the plan was completed. The report should also contain diversion staff's assessment of the general stability achieved by the participant. Such a summary assessment enables the decision-maker to make an intelligent decision whether or not to drop charges; it is in the interest of society as well as the participant that some of the weight for this decision be assumed by the program. A well-developed staff-participant relationship produces a great deal of information about each participant's past and present activities and future plans. The final report should contain a summary of all verified information not directly concerned with the service plan.

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[10] *Ibid.*

[11] Gorelick, J., *Pretrial Diversion: The Threat of Expanding Social Control*, 10 HARVARD CIV. RTS.—CIV. LIB. L. REV. 180, 201 (1975). *See also*, Zaloom, J., *Pretrial Intervention Under New Jersey Court Rule 3:28, Proposed Guidelines for Operation* (ABA Pretrial Intervention Service Center, Article Reprints Series, No. 2, January, 1975) (hereinafter cited as Zaloom).

It must be remembered, however, that diversion programs are not advocates for participants[12] but that they stand in the neutral position of seeking to assist defendants to secure services and to advise decision-makers about participant outcome. Reports, therefore, should not be deliberately slanted to favor participants. A report recommending dismissal should include positive and negative verified information (if there are any negative aspects of the case) so that the judge or prosecutor can make a reasoned decision. (Further discussion of the confidential/non-confidential aspects of the report are discussed in Chapter 6 of these Standards.)

STANDARD 4.3 It Should Be The Responsibility Of Defense Counsel To Challenge Prosecutorial Or Court Refusal To Dismiss Charges Where Program Requirements Have Been Met. It Should Be The Responsibility Of The Diversion Program To Insure General Enforcement Of Dismissal Agreements.

COMMENTARY

When a participant has successfully completed the standard diversion requirements in the judgement of the diversion staff, and has received the program's recommendation that the charges be dismissed, usually the court or prosecutor or both must evaluate the recommendation and decide whether or not actually to drop the charges.[13] The court or prosecutor may then either dismiss or *nolle prosequi* the charges, or extend the diversion period (where permitted by authorized procedures),[14] or refuse to enter the dismissal or *nolle prosequi* and return the participant to prosecution in the ordinary course.[15] In the event of extension of the time desig-

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[12] *See* Standards 2.9, 4.3, 6.5, *infra*, and accompanying commentary.

[13] Abt Report, *supra* note 8, at 79; Mullen, *supra* note 9, at 12; NAC COURTS REPORT, *supra* note 1, at 39-40.

[14] Abt Report, *supra* note 8, at 39. *See, e.g.*, New Jersey Supreme Court Rules Governing Criminal Practice, Rule 3:28, Proposed Guidelines for Operation (ABA Pretrial Intervention Service Center, Article Reprints Series, No. 2, January, 1975) (hereinafter cited as Zaloom).

[12] *See* Standards 2.9, 4.3, 6.5, *infra*, and accompanying commentary.

[13] Abt Report, *supra* note 8, at 79; Mullen, *supra* note 9, at 12; NAC COURTS REPORT, *supra* note 1, at 39-40.

[14] Abt Report, *supra* note 8, at 39. *See, e.g.*, New Jersey Supreme Court Rules Governing Criminal Practice, Rule 3:28, Pretrial Intervention Programs, §§ (c) (2) and (d) (90-day continuance for diversion may be followed by additional such period if so requested by program and agreed to by Prosecutor, and, in cases involving drug abusers, may be so continued for up to two years). The text of New Jersey Court Rule 3:28 is reproduced in its entirety in *State* v. *Leonardis, Rose and Battaglia, (Leonardis I)*, 72 N.J. 85 (1976) and in Pretrial Intervention Service Center, AUTHORIZATION TECHNIQUES FOR PRETRIAL INTERVENTION PROGRAMS: A SURVIVAL KIT (Washington, DC, 1977) (hereinafter cited as SURVIVAL KIT).

[15] NAC COURTS REPORT, *supra* note 1, at 39-40; Abt Report, *supra* note 8, at 83.

nated for program participation against the recommendation of the program and/or prosecutor, although not in effect a termination, the participant should have the right to a hearing to challenge the extension.[16]

In the event of an unfavorable recommendation from the program or a favorable report that does not lead to the dropping of charges, it is the responsibility of defense counsel to obtain the information relevant to the unfavorable decision. He should seek the information from the diversion program, the judge, or the prosecutor.[17] Diversion programs should preserve, in writing, all decisions adversely affecting the status of participation and the reasons therefor. It is also the responsibility of defense counsel, not the program, to challenge the appropriateness of such decisions.[18]

Consistent with Standard 2.8, *supra*, which imposes an affirmative obligation on the diversion program to ensure that agreed-upon eligibility guidelines are enforced, programs should also insure that program completion guidelines are not being violated. The program, it must be stressed, was party to an agreement with the divertee about the case disposition if diversion were successfully completed. Where that representation has proved inaccurate and the good faith expectation of the divertee has been

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[16] For a summary of the due process procedures that should obtain at such a hearing, as at a termination hearing for cause, *see* Standard 5.5, *infra*, and accompanying footnotes and commentary.

[17] For a thorough review of the parameters of vigorous defense counsel representation of divertees in this and other respects, *see* Goldbert, N., *Pretrial Diversion—Bilk or Bargain?* 31 NLADA BRIEFCASE 6 (1973), and National Legal Aid and Defender Association Study Commission on Defense Services, *Colloquium on the Future of Defense Services*, Chapter VI, "The Defense Attorney's Role in Diversion and Plea Bargaining," (Chicago, Ill., 1976).

[18] Almost every leading legal commentator and national report which has addressed the issue has recommended that all adverse decisions in the diversion process—whether denial of enrollment, or termination from enrollment, or otherwise—be reduced to writing by the active agent(s) involved, *i.e.*, program administrators, prosecutors, judges. *See, e.g.*, NAC COURTS REPORT, *supra* note 1, at 40-41; PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 3, at 41-45; Pearlman, *supra* note 3, at 47-52; Zaloom, *supra* note 11, at 26-29; Aaronson, D., *et. al.*, THE NEW JUSTICE: ALTERNATIVE TO CONVENTIONAL CRIMINAL ADJUDICATION 27 (LEAA, 1977) (hereinafter cited as NEW JUSTICE). *See also* the rationale for written notice of grounds for adverse action advanced by the New Jersey Supreme Court in *State* v. *Strychnewicz* 71 N.J. 85 (1976). Though Strychnewicz involved a denial of *enrollment* in diversion without the furnishing of written reasons therefore, the Court's reasoning supporting the due process necessity of written reasons is equally as applicable to the termination situations.

violated, the program, as well as the criminal justice decision-makers involved, has an obligation to see that the agreed-upon bargain is kept.[19] While Standard 4.2 states that diversion programs should not view themselves as advocates for the defendant and while the diversion program must be careful not to usurp the role of defense counsel, nevertheless, it must act to protect its own integrity when other actors in the diversion process disregard agreed-upon guidelines for final disposition in successful cases.[20]

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[19] Much has been written in recent years in support of the concept that prosecutor offices, courts and other criminal justice agencies engaged in essentially administrative (as opposed to trial-type) disposition of cases (*e.g.*, screening, diversion, plea bargaining) promulgate and comply with procedural rules to govern their own conduct and thereby insure adherence to uniform standards. Sadly, as one recent commentator has noted:

> Rulemaking alternatives appears to have attracted more support in theoretical discussions than in actual practice. . . .
>
> One theme of this study, highlighted by the discussion of legal issues in agency rulemaking powers . . . is that many of the abuses seen in our criminal justice system can be attributed to the secret or unfettered discretion exercised by criminal justice agencies. Matters of grave public concern, as well as matters of concern to the defendants most affected by the decisions, are the result of 'informal' policies and practices.
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> . . . . . .
>
> (For example), all too often the decision to terminate a defendant from a pretrial diversion program unfavorably——and perhaps prosecute him more vigorously for his "failure"——are unreviewable.
>
> *Recommendation No. 19.* Thoughtful consideration should be undertaken to requiring crminal adjudication system agencies to follow specified procedures, which provide for publication and review by affected agencies and the public, in promulgating rules which govern that agency's relations with other agencies, defendants, victims, or the public. The rulemaking provisions of the Federal Administration Procedures Act might well serve as a model.

NEW JUSTICE, *supra* note 18, at 37. *See also* David, K., DISCRETIONARY JUSTICE (1972); Balch, J., *Deferred Prosecution: The Juvenilization of the Criminal Justice System*, 38 FED. PROBATION 46 (June, 1974); Loh, W., *Pretrial Diversion from the Criminal Law* 83 YALE L.J. 827 (1974); Bubany, C., and Skillern, F., *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AMER. CRIM. L. REV. 473 (1976); American Law Institute Model Code of Pre-Arraignment Procedure, § 320.9 (Tent. draft, 1972).

[20] Admittedly, acting upon this moral responsibility could, depending on local circumstances, be a difficult thing for a diversion program. Where the diversion process is governed by legislation or count rule that specifies that successful completion of program requirements *shall* be followed by dismissal, the program is in a stronger position——legally——to press prosecutors or individual judges to comply with dismissal agreements, although this does not take into account the inevitable political considerations. Likewise, where the diversion process in each case is exemplified by a written "contract" or agreement entered into by the divertee and justice system officials at the commencement of the diversion period, a subsequent refusal to drop charges where program requirements have been met could be challenged more successfully than where the understandings governing diversion enrollment were only *oral* representations by prosecutor and/or court. Finally, the extent of bar association and community support for diversion generally could well have an indirect but important effect on whether programs possess the clout to pressure individual justice system officials to comply with dismissal agreements.

STANDARD 4.4 Records Relating To Arrest, Diversion Participation, And Final Disposition Should Be Sealed Upon Successful Completion Of The Diversion Program. Criminal Justice Personnel Should Be Permitted Access To Such Records Solely To Determine Whether A Diversion Candidate Has Previously Been Diverted.

COMMENTARY

The successful completion of a pretrial diversion program should not, in theory, leave a participant in society with a criminal record of any kind or with any of the disabilities that result from such a record. Records of arrest, conviction, or diversion program participation can find their way into the offices of prospective employers, credit bureaus and law enforcement agencies.[21] This Standard is directed at diminishing some of these liabilities by providing for the sealing of all records after successful completion of the diversion program.[22]

Some diversion programs have provisions for expungement (as distinct from sealing) of records.[23] For others, expungement may be available for reasons not directly connected with diversion, *e.g.* where a statute provides for expungement of records for all defendants whose charges have been dismissed, who have been acquitted, or who have been discharged without conviction, regardless of reason.[24] For the reasons stated below,

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[21] For a discussion of these and other untoward results of the possible stigma associated with the mere fact of an arrest--and by extension, a dismissal after diversion--*see* Gorelick, J., *Pretrial Diversion: The Threat of Expanding Social Control*, 10 HARVARD CIV. RTS.—CIV. LIB. L. REV. 180, 198 (1975) (hereinafter cited as Gorelick). *See also Hearings on S.1819, The Federal Criminal Diversion Act of 1977.* Before the Subcomm. on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 96th Cong., 2d. Sess. (1977) (hereinafter cited as *1978 Senate Hearings*) at 76 (statement of Pretrial Services Resource Center Director Madeleine L. Crohn).

[22] For a discussion of the practical distinctions between expunging and sealing records, *see generally* Stark, E., *Expungement and Sealing of Arrest and Conviction Records*, 5 SETON HALL L. REV. 865 (1974) (hereinafter cited as Stark).

[23] *See* Report of the Subcomm. on Elimination of Inappropriate and Unnecessary Jurisdiction of the Departmental Committees for Court Administration of the Appellate Division, First and Second Departments, New York Supreme Court, DIVERSION FROM THE JUDICIAL PROCESS 296 (1974) (compendium of diversion program expungement provisions). *See also* SURVIVAL KIT, *supra* note 14, at Appendices C & D (review of expungement provisions in existing diversion statutes and court rules).

[24] *See, e.g.*, New Jersey Statutes Annotated, §§ 2A: 85-15 *et seq.* (Supp. 1976-77); Connecticut General Statutes Annotated § 54-90 (Supp. 1976); and Minnesota Statutes Annotated § 299 (1972).

For a compendium of state statutory citations to existing criminal record expungement statutes, together with a comparative analysis, *see Hearings on Criminal Justice Data Banks Before the Subcomm. on Constitutional Rights of the Senate Committee on the Judiciary*, 93rd Cong. 2d Sess. (1973-74) reprinted as Congressional Research Service, "Summary of State Statutes Providing for Expungement, Sealing, Destruction or Return of Various Criminal Records" 718 (1974). For an updated compendium of state legislation, together with citations to various pending bills, in this area, *see* Search Group, Inc., *Technical Memorandum No. 15, Security and Privacy Rulemaking: Resources, Terms and References* 11, 12 (Sacramento, CA, 1978).

however, these Standards reject expungement as a satisfactory solution for insuring the privacy of arrest and diversion program participation information. They also reject the concept of total destruction of these underlying records because future access for legitimate, though limited, purposes by the criminal justice system is essential.[25]

Expungement of records is not unique to diversion. Juvenile court procedures, youth corrections statutes and drug rehabilitation referral schemes routinely specify that records of defendants involved will be expunged.[26] In actual practice, expungement often amounts to no more than lining-out data entries or stamping "expunged" across the face of the entries.[27] In these instances the underlying information often remains fully

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[25] *See* note 31, *infra*, and accompanying text. *See also* Standard 6.1, *infra*, and accompanying text.

> As one recent commentator has concluded with regard to this subject:
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> The sealing and purging [of arrest and disposition records] recommendation rests on two premises. First, . . . that the usefulness of a record diminishes with age. . . . Second, . . . that after an individual has fully repaid his debt to society, he can walk out of the 'record prison' a free man. In view of the stigma and injury that flows from dissemination of criminal records, such records should at some point be purged (or sealed with strict limits on reuse) if the concept of offender rehabilitation is to have much meaning.
>
> [a] number of celebrated court opinions have confronted the arrest record issue. Depending upon the character of the arrest and subsequent adjudicatory action, courts have been willing to limit the use of arrest records in two respects: (1) order sealing or expungement of the record; (2) or limit the use of the records to the criminal justice system.

However, the commentator goes on to caution:

> [T]he Supreme Court's 1976 opinion in *Paul* v. *Davis* may signal that, in future, courts will be far more reluctant to place restrictions on criminal justice agency use or dissemination of arrest records. In the *Davis* case, the Court declared that police distribution of a flyer of 'active shoplifters,' which contained the names and photographs of people who had been arrested but not convicted of shoplifting did not meet a statutory test for relief from government violations of constitutional rights. The Court emphasized that the plaintiff's claim challenged the right of the state to publicize 'records of an official act.' [Footnotes ommitted.]

Search Group, Inc., *Technical Memorandum No. 13 (revised, Jan. 1978), Standards for Security and Privacy of Criminal Justice Information* 6, 7 (Sacramento, CA, 1978) (hereinafter cited as *Standards for Security and Privacy*). *But see also Houston Chronicle Publishing Co.* v. *City of Houston*, 531 SW 2d 177 (Ct. Civ. App. of Texas, 14th Distr., 1975) (giving public, press access to summary arrest history records, as distinct from dispositions in particular cases of immediate public interest, would lead to "massive and unjustified damage to the individual").

[26] *See, e.g.*, the Federal Youth Corrections Act, 18 U.S.C. § 5021 (Supp. 1977) and the probation-without-verdict section of the Federal Controlled Substances Act, 21 U.S.C. § 844 (b)(2), both of which have served as models for parallel legislation at the State level.

[27] *See generally* Stark, *supra* note 22; Comment, *Amplification of Arrest Records by Criminal Courts: A Judicial Compromise*, 13 CRIM. L. REV. 139 (1975); Note, *Discrimination on the Basis of Arrest Records*, 56 CORNELL L. REV. 470 (1971); Hess and LaPoole, *Abuse of the Records of Arrest Not Leading to Conviction*, 13 CRIME & DELINQUENCY 494 (1967).

or partially readable. Expungement of this sort, common in manually-compiled criminal justice information systems, provides no privacy or impediment to access at all.[28]

The ultimate and extreme solution would consist of defacing or destroying criminal justice information entirely. Aside from the existence of court decisions in some jurisdictions which expressly prohibit destruction of such records[29] and the existence of freedom of information statutes in others which express a contrary legislative intent,[30] there are valid reasons not to destroy data that otherwise should be kept private. With the proliferation of diversion programs, information about which defendants have applied for or been enrolled in diversion programs in the past, in either the same or in different jurisdictions, becomes crucial to decision-makers. Many programs are designed primarily to assist "first offenders" (though some permit persons with prior conviction records to become enrolled under certain conditions).[31] If records are permanently expunged or destroyed and become unavailable to diversion decision-makers, participants who are rearrested would be able to retain "first offender" status indefinitely. The recommended solution is to seal participants' records, permitting access only when a defendant applies to participate in a diversion program and limiting use for that purpose only. Such records should be kept by a custodian designated by the legislature, court or prosecutor. In the event of improper disclosure, the custodian might be held civilly liable.[32]

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[28] *Ibid. See also* DeWeese, J., *A Proposal for the Federal Regulation of Crime Data Bank*, 6 RUTGERS—CAMDEN L. J. 26 (1974).

[29] *See, e.g., Morrow* v. *District of Columbia*, 135 U.S. App. D.C. 160, 173; 417 F. 2d 728, 741 (1969) (law requires arrest books, other *court* dockets to be publically maintained; therefore physical destruction of any arrest record by the trial court is unlawful); *Benjamin Spock et. al.* v. *District of Columbia*, 283 A. 2d 14 (D.C. Ct. App., *en banc*) (1971) (extends *Morrow* rationale to *police* desk books, blotters, other law enforcement agency arrest records). *See also State* v. *Pinkney*, 290 NE 2d 923 (C.D. Ohio, 1972).

[30] In this regard, a recent commentator has noted that while "[a] number of current state laws recognize that disclosure of arrest record information should be restricted" and although "[s]everal state statutes restrict access to arrest records to criminal justice agencies," nevertheless, "in most states, records of formal criminal justice events maintained in record systems that are not accessible by personal identifiers [*i.e.*, police blotters, court docket books, *etc.*] are included within the definition of public record and are available to the public generally or anyone with a 'legitimate interest'."

Standards for Security and Privacy, supra note 24, at 5, 6.

[31] *See* ABA Pretrial Intervention Service Center, DIRECTORY OF CRIMINAL JUSTICE DIVERSION PROGRAMS, 1976 (Washington, DC, 1977) (of 148 diversion programs from 42 states and territories listed, 63 indicated they were limited to first offenders).

[32] The Arkansas Pretrial Diversion Act, reprinted in SURVIVAL KIT, *supra* note 14, contains such a provision in § 5. This is also the approach taken under most of the recent federal and state privacy legislation, much of which applies to criminal history records. *See, e.g.*, the federal Confidentiality of Drug and Alcohol Abuse Treatment Records, 42 Code of Federal Regulations Part 2, §§ 2.1 (f), 2.2 (f), printed in *The Federal Register* for Tuesday, July 1, 1975, vol. 40, no. 127, at pp. 27803, 27804.

The practical administrative problems of keeping records confidential but allowing dissemination for limited purposes are great.[33] There are currently provisions for the sealing of diversion records in some states,[34] and at least one state has tried to solve this problem by requiring a potential divertee to swear under oath that he has never had such a program invoked on his behalf.[35] It is this diversity of approaches to a difficult problem, whether the approach be expungement, sealing or statement under oath, that requires each jurisdiction to work to devise practical solutions to protect the confidentiality of police, court, and program records, while precluding the abuse of the diversion program by applicants who have been previously diverted.[36]

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[33] *See generally, Standards for Security and Privacy, supra* note 24. As the authors succintly summarize the problem,

> . . . both sealing and purging are dispositive remedies which, if improperly used, can damage legitimate law enforcement interests. Improper use of either of these remedies may force police to resort to newspaper morgues or other informal sources for information about prior arrests or convictions or suspected involvement in criminal activities.
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> . . . . . .
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> The goal is to balance criminal justice and societal interests with the interests of the subject individual. As regards standards for accuracy and completeness, the balancing process is made easy because all the parties with an interst in the transaction benefit from the maintenance of accurate and complete information, with the possible exception of subjects who might benefit from an inaccurate or incomplete record that failed to contain adverse but correct information. On the other hand, maintenance of timely information, requires a balance of society's interest in maintaining criminal justice information indefinitely--research indicates that most recidivism occurs within a few years of a conviction and thus society's interest in a criminal record arguably diminishes as the record ages--against the subject's interest in privacy and the subject's, and society's, interest in offender rehabilitation.

Id. at 11.

[34] *See, e.g.*, Act 346, "the Arkansas Pretrial Diversion Act of 1975," § 1 (enacted March 10, 1975), *reprinted in* SURVIVAL KIT, *supra* note 14, at Appendix D.

[35] *Id.* at §4.

[36] For a thorough discussion of the various competing interests of personal privacy and freedom of information *re* criminal history records, *see Standards for Security and Privacy, supra* note 24, at 1-17. *See also* Comment, *Privacy, Law Enforcement and the Public Interest*, 36 MONTANA L. REV. 60 (1975); and Rehnquist, W., *Is An Expanded Right of Privacy Consistent with Effective Law Enforcement?*, 23 KANSAS L. REV. 1 (1974).

STANDARDS

5.1 A Participant Should Be Able To Withdraw From The Program Voluntarily At Any Time Prior To Its Completion And Elect Ordinary Criminal Justice Processing Without Prejudice.

5.2 The Diversion Program Should Retain The Right To Terminate Service Delivery When the Participant Demonstrates Unsatisfactory Compliance With The Service Plan. When Such A Determination Is Made The Participant Should Be Returned To Ordinary Criminal Justice Processing Without Prejudice. The Program Should Provide Written Reasons For Its Decision To The Participant And Defense Counsel. The Information Should Be Confidential And Inadmissable As Evidence Should Prosecution Resume.

5.3 In Order To Minimize Prejudice Toward The Case Of A Divertee Who Returns To Ordinary Criminal Justice Processing, Either Voluntarily Or As The Result Of Termination By The Diversion Program, Judges And Prosecutors, Other Than Those Who Participated In The Original Decision To Divert, Should Be Assigned To The Case.

5.4 Rearrests Which Occur During The Course Of Diversion Program Participation Should Not Be Automatic Grounds For Termination. A Review Proceeding At Which The Fact Of The Rearrest And All Other Relevant Circumstances Are Considered Together With The Participant's Record Of Performance Should Ensue. The Decision Whether Or Not To Terminate Should Occur Only After Weighing All Relevant Factors.

5.5 Whenever A Program Participant Faces Termination He Should Be Afforded An Opportunity To Challenge That Decision, With His Attorney If He So Chooses, Prior To Its Implementation.

STANDARD 5.1 A Participant Should Be Able To Withdraw From the Program Voluntarily At Any Time Prior To Its Completion And Elect Ordinary Criminal Justice Processing Without Prejudice.

COMMENTARY

This Standard takes the position that if diversion enrollment on the part of the defendant is voluntary, then he should retain the right to elect

to withdraw from participation at any point and be remanded to regular criminal justice processing, without prejudice to the defense of the underlying case in which diverted and without formal or informal stigma attaching to the defendant because of his decision to withdraw. It can be argued that to permit voluntary withdrawal at any phase of the diversion process is to invite administrative dislocation, promote the wasteful expenditure of money and manpower by program staff, and impede the chances for a successful renewed prosecution. While these are important considerations that must not be minimized, the right to withdraw voluntarily from participation in what is a voluntary program by a defendant yet to be convicted of the offense charged is so fundamental as to take precedence.[1]

It must be remembered that if the program is voluntary, any form of administrative coercion designed to keep the participant in the program past a point where the defendant voices a desire to go to trial instead of continuing in the program could be as costly as the refusal to permit withdrawal. This refusal is likely to lead to alienation, non-cooperation and possibly eventual unfavorable termination with its concommitant return of the case for traditional prosecution anyway.[2]

Certain safeguards, it must be emphasized, can be employed to reduce the likelihood of such participant-initiated withdrawals: allowing the prospective divertee to know prior to enrollment exactly what the diversion program will expect of him; providing the prospective divertee with

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[1] The right of a divertee to withdraw voluntarily from diversion participation and be remanded to court without prejudice has received scant attention from legal commentators, even those who have written extensively about defendants' due process rights during diversion. Doubtless this is due largely to the fact that few diversion programs experience such withdrawal requests from enrollees. However, it is equally likely that these are rare because either (1) the program takes the view that once diverted, the defendant is "bound" to complete the diversion "contract", and that only unfavorable termination for cause can trigger remand to court; or (2) the program, though it would as a matter of policy accede to voluntary remand requests, fails to inform the divertee that such option is available to him.

Recently, leading diversion advocates have begun to be sensitive to the importance of allowing voluntary withdrawals from diversion without prejudice. *See, e.g., Hearings on S. 1819, the Federal Criminal Diversion Act of 1977, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 96th Cong., 2d Sess. (1978) at 82 (statement of Pretrial Services Resource Center Director Madeleine L. Crohn) (hereinafter cited as Crohn).

Of the existing pretrial diversion statutes and court rules, only the Tennessee legislation explicitly provides for divertee-initated voluntary withdrawal without prejudice. *See* House Bill No. 204 and 1671, "Tennessee Pretrial Diversion Act of 1975", as amended, at § 4(d). The Statute is reprinted in ABA Pretrial Intervention Service Center, AUTHORIZATION TECHNIQUES FOR PRETRIAL INTERVENTION PROGRAMS: A SURVIVAL KIT (Washington, D.C., 1977) at Appendix D (hereinafter cited as SURVIVAL KIT).

[2] This point has received scant attention in the ever-burgeoning literature on all aspects of the diversion process. However, for a persuasive explication of the critical importance of motivation to successful completion of the diversion process, *see generally* Fitzgerald, D., SERVICES I: THE IMPORTANCE OF THE SERVICE CONTRACT IN PRETRIAL DIVERSION (Pretrial Services Resource Center, 1978) (in press).

counsel prior to having to opt for diversion so that a full understanding of the advantages of diversion to the defendant versus proceeding with other avenues is afforded; providing for the mandatory development of a service plan tailored to the particular participant's needs, established early in the diversion process and with the participant's active input; and setting a limitation on maximum program duration. Each of these safeguards is advocated by these Standards.[3] Utilization of these and other techniques to avoid misunderstanding and to flag participant disinterest or insincerity can be expected to avoid most participant-initiated withdrawal requests and to cause those which do occur to arise early in the diversion process (rather than after time and energy has been expended by diversion staff), when dislocation is minimal.

One who voluntarily withdraws from a pretrial diversion program prior to completion should be able to do so without prejudice. Prosecutors and judges often view non-completion of diversion as a failure on the part of the defendant to utilize the opportunity offered him. Consequently, the defendant is treated more harshly once remanded to court.[4] Yet there are a variety of circumstances under which non-completion can occur which are not truly reflective of failure by any party.

It is possible that the diversion option was presented at the wrong moment or was the wrong option for that particular defendant. Perhaps the program did not have the capacity to help the participant and the participant resisted the resultant requirements placed on him. No one is at fault and non-completion will generally be agreed upon either explicitly or tactily (through the divertee's actions). It should be realized that pretrial diversion is a human endeavor which may or may not work and like all human endeavors has many variables which make an absolute rate of success impossible.[5]

It is incumbent upon program staff in discussions with judges and prosecutors to emphasize that non-completion may be no one's fault. While it is hoped that this exchange will minimize the bias of judges and prosecutors involved in the trial of a divertee who is returned to court, further steps to minimize that prejudice may be attempted in accordance with Standard 5.3, *infra, (i.e.,* that any case returned for prosecution

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[3] *See* Standards 2.6, 3.1, and 3.2, *supra,* and accompanying commentary.

[4] A number of commentators have suggested [illegible] al experiences and from interviewing defense attorneys who have rep[illegible]avorably terminated divertees, that this is the case. *See, e.g.,* Crohn, *supra* note 1, [illegible]oh, W., *Pretrial Diversion from the Criminal Process,* 83 YALE L. J. 827, 842 and note 81 (1974) (hereinafter cited as Loh); Mullen, J. THE DILEMMA OF DIVERSION: RESOURCE MATERIALS ON ADULT PRETRIAL DIVERSION PROGRAMS 26 (LEAA 1976) (hereinafter cited as Mullen); *Hearings on H.R. 9007 and S. 798 Before the Subcomm. on Courts, Civil Liberties & Admin. of Justice of the House Committee on the Judiciary,* 93d Cong., 1st Sess. (1973) (testimony of Marshall Hartmann, Esq., on behalf of NLADA).

[5] Crohn, *supra* note 1, at 78-80; Zaloom, J., *Pretrial Intervention Under New Jersey Court Rule 3:28 Proposed Guidelines for Operation,* CRIMINAL JUSTICE QUARTERLY, vol. 2, no. 4 (Fall, 1974), reprinted (and repaginated) as ABA Pretrial Intervention Service Center, *Pretrial Intervention Article Reprint No. 2* (January, 1975) at 13-14, 19 (hereinafter cited as Zaloom).

because of non-completion be prosecuted by a prosecutor and tried before a judge neither of whom was involved in the diversion process).

STANDARD 5.2 The Diversion Program Should Retain The Right To Terminate Service Delivery When The Participant Demonstrates Unsatisfactory Compliance With The Service Plan. When Such A Determination Is Made The Participant Should Be Returned To Ordinary Criminal Justice Processing Without Prejudice. The Program Should Provide Written Reasons For Its Decision To The Participant And Defense Counsel. The Information Should Be Confidential and Inadmissable As Evidence Should Prosecution Resume.

COMMENTARY

Pretrial diversion programs often face the situation where service delivery is no longer possible or no longer feasible. The reasons may be programmatic, may relate strictly to participant choice or may be due to the intervention of third parties, *e.g.* the prosecutor. These Standards apply equally in such situations. As noted in the *Commentary* to Standard 4.1, these Standards do not propose concrete, uniform performance requirements for diversion programs in the form of a Standard. Accordingly, these Standards also do not propose in the form of a Standard what warrants ceasing service delivery to a participant. As there might exist a consensus for basic program requirements as suggested in the *Commentary* to Standard 4.1, so might there exist a parallel consensus of what warrants termination. It would seem that the following situations would make service delivery no longer possible and therefore diversion meaningless: where the divertee, either through failure to keep scheduled appointments or because he has left the jurisdiction, has lost contact with the program staff; where a subsequent arrest in light of the participant's unsatisfactory record of performance in the program makes prognosis for successful completion of the program poor; and where chronic noncooperation with program staff in trying to achieve the goals enumerated in the service plan makes the service plan no longer viable.[6]

On the other hand, situations will also exist where service delivery to a participant is no longer productive: where, although contact with the program staff is maintained and there have been no rearrests and there is ostensible cooperation with the staff, it is obvious that the divertee is not interested in self-improvement or achieving any substantive service plan goals; or where the participant is not making any gains by program participation and, in fact is only going through the motions of complying with standard program requirements. To continue service delivery to this participant who chooses not to avail himself of those services is a waste of resources. Accordingly, this type of participant should be terminated. Yet,

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[6] *See* discussions of the appropriateness of various responses to these grounds for unfavorable termination in Crohn, *supra* note 1, at 80; Zaloom, *supra* note 5, at 14, 19; Mullen, *supra* note 4, at notes 54, 58 and accompanying text.

at the same time, it may well be that the plan originally devised for him and in consultation with him is no longer appropriate.

Before the decision to terminate is final, it is suggested that where the reason for termination is non-cooperation in fulfilling service plan goals, alternate service plan approaches should be considered. In any case, prior to finalizing the termination decision, counsel should be informed of the tentative decision and have an opportunity to contact his client and review the possible consequences of remand to traditional court proceedings.[7]

Throughout the process, the participant and defense counsel should receive written statements from the diversion program delineating the reasons for tentative termination.[8] In cases in which contact with the participant has been lost, defense counsel should be provided with this information. In the best of circumstances, this may clarify possible misunderstandings and enable the participant to remain in the program. When the decision is no longer tentative but final, written reasons for this action should be provided to the participant and defense counsel for possible challenge at the pre-termination hearing.[9] (See Standard 5.5 and its *Commentary, infra*).

As a general rule, diversion programs do not have the authority to return program participants to ordinary prosecution, but must recommend such action to the prosecutor or court.[10] The delivery of complete information to the prosecutor or court or, as also provided for in these Standards, to an independent hearing examiner, is important since they must ultimately make the decision to terminate participation in pretrial diversion and to resume the traditional criminal process.

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[7] *See, e.g.*, Aaronson, D., *et al*, THE NEW JUSTICE: ALTERNATIVES TO CONVENTIONAL CRIMINAL ADJUDICATION 27 (LEAA, 1977) (hereinafter cited as NEW JUSTICE); Zaloom, *supra* note 5, at 29.

[8] This is the approach recommended by all leading studies and legal commentators. *See, e.g.*, National Advisory Commission on Criminal Justice Standards and Goals, REPORT ON THE COURTS 39-41 (Washington, D.C., 1973) (hereinafter cited as NAC COURTS REPORT); NEW JUSTICE, supra note 7, at 26-28. Zaloom, *supra* note 5, at 26-29; Crohn, *supra* note 1, at 82; Loh, *supra* note 4, at 853-854; American Law Institute, MODEL CODE OF PRE—ARRAIGNMENT PROCEDURE § 320.9(1) (Tent. Draft No. 5, 1972) (hereinafter cited as ALI Model Code); ABA PRETRIAL INTERVENTION SERVICE CENTER, PRETRIAL INTERVENTION LEGAL ISSUES: A GUIDE TO POLICY DEVELOPMENT 43-45 (Washington, D.C., 1977) (hereinafter cited as PRETRIAL INTERVENTION LEGAL ISSUES); Bubany, C., and Skillern, F., *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AMER. CRIM. L. REV. 473, 501 (1976) (hereinafter cited as Bubany & Skillern).

[9] *Ibid.*

[10] For a discussion of the issue of prosecutors and/or courts delegating intake and outtake diversion decisions to program administrators, *see* PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 8, at 15-16. That publication recommends delegation of the responsibility to hold a hearing to an independent hearing examiner, who then recommends to the prosecutor or court, which makes the legal decision whether to terminate. *Id.* at 16. This is also the view of other commentators who, however, go a step further and recommend a full adversarial hearing, with a judge presiding, an avenue of appeal from an adverse decision by the hearing officer. *See, e.g.*, ALI Model Code, *supra* note 8, at § 320.9(2).

The delivery of this information raises problems of confidentiality of communication between program participant and program staff.[11] Each program, therefore, should receive from criminal justice officials commitment to the agreement that use of program information will be limited to the determination of whether a participant will in fact be terminated. This commitment is best embodied in a statute or court rule,[12] with specific language providing for the inadmissibility of program information in "any proceeding, including sentencing."[13]

Return to the traditional process here, as in the situation of one who voluntarily withdraws from the diversion program, should be without prejudice and the same reasons which militate against prejudice toward the former divertee when he voluntarily withdraws from the program and faces possible prosecution in the traditional process are operable here.[14] (See *Commentary* to Standard 5.1, *supra*).

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[11] *See* standards 4.2, 6.2 and 6.3, *infra*, and accompanying commentary and notes.

[12] New Jersey Court Rule 3:28, enacted in 1974, at § (c)(4) is admirably explicit in this regard. It provides that:

> [d]uring the conduct of hearings subsequent to an order returning the defendant to prosecution in the ordinary course, no program records, investigative reports, reports made for a court or prosecuting attorney, or statements made by the defendant to program staff shall be admissable in evidence against such defendant.

Guidelines promulgated September 8, 1976. To interpret these the provisions of this Rule go even further in stating that "*no information* . . . obtained as a result of a defendant's application to or participation in a pretrial intervention program should be used, in *any* subsequent proceeding, *against his or her advantage*." (Emphasis added.) New Jersey Supreme Court, *Guidelines for the Operation of Pretrial Intervention in New Jersey, Guideline No. 5* (September 8, 1976). (The text of the Court's interpretive *Guidelines* is reproduced in full in the body of its *Leonardis I* opinion, 71 N.J. 85 (1976).)

Likewise, the Massachusetts Diversion Act makes a vigorous attempt to address this issue in as broad a fashion as possible, when it provides, at § 5, that:

> [a]ny request for assessment or a decision by the defendant not to enter such a program or a determination by the program that the defendant would not benefit from it, or any statement made by the defendant during the course of assessment, shall not be admissable against the defendant in any criminal proceedings; nor shall any consent by the defendant to the stay of proceedings or any act done or statement made in fulfillment of the terms and conditions of such stay of proceedings be admissable as an admission implied or otherwise against the defendant, should the stay of proceedings be terminated and criminal proceedings resumed on the original charge or charges. No statement or other disclosure or records thereof made by a defendant during the course of assessment or during the stay of proceedings shall be disclosed at any time to a prosecutor or other law enforcement officer in connection with the charge or charges pending against said defendant or any co-defendant.

House Bill No. 2199, "The Massachusetts Pretrial Diversion Act of 1974), reprinted in SURVIVAL KIT, *supra* note 1, at Appendix D.

Of the other existing diversion statutes and court rules, only the Pennsylvania Rule makes any attempt to address the issue, and does so in a much less comprehensive fashion: It provides, at Rule 179 § (b), that only statements made by the prospective divertee and/or defense counsel *to the prosecutor or judge, at or before intake*, are confidential in the event of renewed prosecution. *See* SURVIVAL KIT, *supra* note 1, at Appendix C.

[13] Zaloom, *supra* note 5, at 25.

[14] *See* Zaloom, *supra* note 5, at 25-26.

STANDARD 5.3 In Order To Minimize Prejudice Toward The Case Of A Divertee Who Returns To Ordinary Criminal Justice Processing, Either Voluntarily Or As The Result Of Termination By the Diversion Program, Judges And Prosecutors, Other Than Those Who Participated In the Original Decision To Divert, Should Be Assigned To The Case.

COMMENTARY

Standards 5.1 and 5.2 propose that any divertee who returns to ordinary criminal justice processing should do so without prejudice to his case should the prosecution be resumed. The *Commentary* to Standard 5.1 discusses the view held by some judges and prosecutors that non-completion of the diversion program whether initiated by the participant, the program or other parties, indicates a failure on the part of the defendant. Such a view leads to harsher treatment when the former divertee returns to traditional court proceedings.

This Standard attempts to address that problem. A judge who participates in the diversion decision may feel that a former divertee has breached some trust that the judge has put in the divertee. In addition, it is difficult to imagine that a judge who has received negative reports on a former divertee can be totally impartial in presiding over traditional court proceedings in his case. The solution suggested by this Standard is to divorce any resumption of ordinary prosecution from the review of prior diversion participation by precluding any judge who had involvement during the phase of diversion participation from presiding over traditional court proceedings in that defendant's case.[15] Obviously, where the number of judges available is small, implementation of this Standard is difficult and may necessitate assignment of these non-completed cases to a neighboring jurisdiction.

In both programs operated entirely by the prosecutor's office (without judicial participation in diversion) and those in which the diversion process is implemented by the prosecutor and the judiciary in concert, this Standard suggests that the chief prosecutor adopt a policy of assigning the renewed prosecution of such terminated cases to his assistants who have not participated in the diversion decisions.

It is realized, however, that the solution proposed here is not a total solution. In many situations where a case is reassigned to a new judge or a different prosecutor, that new judge and prosecutor can be expected to discover the reason for the reassignment. Nevertheless, it is felt that a judge and prosecutor more distant from the diversion process in a specific case will be comparatively more impartial than their counterparts who were originally involved in the process.

STANDARD 5.4 Rearrests Which Occur During The Course of Diversion Program Participation Should Not Be Automatic Grounds For Termination. A Review Proceeding At Which The Fact Of The Rearrest And All

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[15] This course is likewise recommended by Zaloom, *supra* note 5, at 29 and PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 8, at 44.

Other Relevant Circumstances Are Considered Together With The Participant's Record Of Performance Should Ensue. The Decision Whether Or Not To Terminate Should Occur Only After Weighing All Relevant Factors.

COMMENTARY

In many current programs, a defendant who is rearrested while in a pretrial diversion program is often automatically terminated from the program and is returned to court for regular processing.[16] This practice is even more widespread when rearrest charges result in conviction.

It is suggested that such termination not be automatic.[17] Unless the defendant has pleaded guilty or until conviction on the charge, he is presumed innocent of that charge.

This standard suggests that a review proceeding be conducted to evaluate the facts and circumstances surrounding the rearrest, as well as the rearrest itself, and the divertee's record of performance in the program. The nature of the charge and circumstances surrounding the rearrest may be important in assessing whether the program is having impact on the divertee and continuation in the program seems warranted. The nature of the charge should be considered; if the new charge is the same or similar to the old charge the rearrest may be indicative of a pattern of ongoing behavior and termination then may be deemed necessary. Where the charge is entirely different, the rearrest may not indicate any pattern at all. Whether there are co-defendants who are the same in both cases or whether the alleged crime occurred in the vicinity of the alleged previous offense on which diverted may also be indicative of a pattern of behavior likely to continue. The weight of the evidence should be considered for it might serve no one's interest to terminate a divertee whose rearrest case is later dismissed for insufficient evidence.[18]

The divertee's performance in the program is also relevant to the termination decision. Where the divertee is showing gains as a result of participation in the program, the rearrest may be an isolated phenomenon

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[16] *See, e.g.*, Mullen, *supra* note 4, at 99 (termination for rearrest policy of Boston Court Resource Program) and 109 (termination for rearrest policy of Dade County, Florida PTI Program).

[17] *See id* at 88 (policy of Operation DeNovo not to terminate automatically, but instead to weigh all factors). According to Mullen, "[u]nsuccessful termination from DeNovo occurs largely because of a reoffense or 'abscodance.' However, no longer are reoffenders automatically terminated. Staff became aware that reoffense did not necessarily result in a conviction, and further, that reoffense by an otherwise cooperative DeNovo participant might result in a less severe sentence, if convicted." *See also* Zaloom, *supra* note 3, at 28.

[18] However, the D.C. Court of Appeals, in ruling on a case where a defendant diverted to the local drug diversion program had been unfavorably terminated on the basis of a probable cause rearrest which was later dismissed, ruled that not only could the prosecutor move to terminate prior to a final disposition on the rearrest, but that *even an eventual dismissal of the rearrest case* would not invalidate a termination from diversion where the program guidelines authorized termination for a probable cause rearrest (not conviction) alone. *See Walter L. Green, Jr. v. United States*, opinion No. 11640 (D.C. Ct. App., decided *en banc* 9/7/77).

and not indicative of additional future arrests. It might be unrealistic to expect a complete alteration of lifestyle and behavior as a result of one short-term intervention.[19] It is only by weighing these factors that a realistic decision can be made concerning what is best for the participant and the community in the long-run.

While courts have held that probation and parole can be revoked because of a rearrest[20] and at least one jurisdiction has extended that rationale to provide for termination from the diversion process for a mere rearrest without any greater finding,[21] it can be argued that the probation and parole revocation holdings can be distinguished from the situation of termination from pretrial diversion. In the former situations, revocation is partially based on the fact of prior conviction of the offense for which the individual is on probation or parole; in the latter situation, the participant is still presumed innocent of the charge(s) for which he was originally diverted. Arguably, termination from a pretrial diversion program should not occur merely because the participant has been rearrested but, rather, should occur only if and when a weighing of all relevant factors indicates that this is the best course to take in the case in question.

STANDARD 5.5 Whenever A Program Participant Faces Termination He Should Be Afforded An Opportunity To Challenge That Decision, With His Attorney If He So Chooses, Prior To Its Implementation.

COMMENTARY

As noted in the *Commentary* to Standard 5.2 and 5.4, a termination decision may be based on subjective factors and the termination may in fact be arbitrary. As a result, a mechanism should be provided for the divertee and defense counsel to be heard before a termination decision is made.[22]

Commentators have argued that this hearing is required to be consistent with principles expressed by the Supreme Court in *Morrissey* v. *Brewer*[23] and in *Gagnon* v. *Scarpelli*.[24] The Court in *Morrissey* and *Gagnon* held that a preliminary due process hearing is required prior to revocation of parole and probation, respectively.[25] The Court suggested that

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[19] *Crohn, supra* note 1, at 77-78, 80; Zaloom, *supra* note 5, at 24; Mullen, *supra* note 4, at 10, 13.

[20] *See, e.g., Knight* v. *Estelle*, 501 F.2d 963 (5th Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975); and *State ex rel. Florida Parole & Probation Commission* v. *Helton*, 313 So. 2d 413 (Fla. App. 1975).

[21] *See* note 18, *supra*.

[22] This is the view of all leading commentators who have addressed the issue. *See* note 8, *supra*.

[23] 408 U.S. 471 (1972) (parole revocation requires due process hearing).

[24] 411 U.S. 778 (1973) (probation revocation requires due process hearing).

[25] *See* discussion of the holdings in *Morrissey* and *Gagnon* and their applicability to pretrial diversion, by analogy, in PRETRIAL INTERVENTION LEGAL ISSUES, *supra* note 8, at 41-45 and in Jaszi, P., and Pearlman, H., LEGAL ISSUES IN ADDICT DIVERSION: A TECHNICAL ANALYSIS 121-128 (Drug Abuse Council, Inc., and ABA Corrections Commission, 1975).

other due process considerations should apply, including notice of violation(s), the right to testify and present demonstrative evidence, the right to present witnesses and cross-examine witnesses and the right to a hearing before an independent officer, which need not be a judicial officer.[26] Although these cases dealt with parole and probation, the principles of *Morrissey* and *Gagnon* arguably apply to pretrial diversion termination because of the similar threat of loss of liberty following program termination.[27]

The California Court of Appeals for the Third District, in the case of *Kramer* v. *Municipal Court*,[28] ruled that a pre-termination administrative hearing which complied with basic due process requirements was *implicitly mandated* for divertees under Penal Code §1000 diversion, despite the fact that the statute was silent on this point.[29] This was the first time a court had directly applied to a pretrial diversion procedure the administrative due process requirement for a hearing enuc' ,ted by the United States Supreme Court in *Morrissey* and *Gagnon*. The fact that the California court did not base its decision on narrow statutory grounds but on general principles of administrative law sets a precedent for requiring pre-termination hearings for any and all diversion programs.[30]

The National Legal Aid and Defender Association in taking a position consistent with this interpretation of cases states, "[t]he right to a hearing prior to termination is required absent a clear showing of legislative intent to the contrary."[31] While the National Advisory Commission on Criminal Justice Standards and Goals provides "for discretionary right of the prosecutor to declare the agreement violated by the defendant and to reinstate prosecution,"[32] the American Law Institute in its recommendations requires a hearing before the prosecutor to determine whether a violation has occurred.[33]

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[26] *Ibid.*

[27] *Ibid.*

[28] 49 Cal. App. 3d 418 (1975).

[29] The California Appellate Court instead based its decision on general principles of due process and administrative law, as developed in a line of state court precedents analogous to those at the federal level. *Id.* at 422.

[30] This is the view advanced by several recent commentators. *See, e.g.*, Bellassai, J., *Pretrial Diversion: The First Decade in Retrospect*, PRETRIAL SERVICES ANNUAL JOURNAL, 1978, 14, 24 (Pretrial Services Resource Center, 1978). *See also State* v. *Ledding*, 158 N.J. Super. 209 (Law Div., 1978) (New Jersey appellate court applies precedents of *Morrissey, Gagnon, Kramer* to require due process termination hearings in New Jersey diversion programs).

[31] National Legal Aid and Defender Association, *National Colloquium on the Future of Defender Services*, Chapter VI, "The Defense Attorney's Role in Diversion and Plea Bargaining", (1974).

[32] NAC COURTS REPORT, *supra* note 8; at 41.

[33] ALI Model Code, *supra* note 8, at § 320.9 (1).

STANDARDS

6.1 Since There Must Be A Relationship Of Trust Between The Diversion Program And The Participant For Program Services To Have A Positive Effect, Diversion Programs Should Specify To The Prospective Participant At Time Of Entry Precisely What Information Might Be Released, In What Form It Might Be Released, And To Whom It Might Be Released, Both During And After Program Participation. As A General Rule, Information Gathered In The Course Of The Diversion Process Should Be Considered Confidential And Not Be Released Without The Participant's Consent.

6.2 Programs Should Strive To Guarantee, By Means Of Interagency Operating Agreements Or Otherwise, That No Information Gathered In The Course Of A Diversion Application Or Participation In A Diversion Program Will Be Admissible As Evidence In The Case For Which Diverted Or In Any Subsequent Civil, Criminal, Or Administrative Proceeding.

6.3 Guidelines Treating The Types Of Information To Be Contained In Reports To Be Released To Criminal Justice Agencies To Support A Dismissal Recommendation Should Be Developed. Such Reports Should Be Limited To Information Which Is Verified And Necessary To Determine Whether The Participant Has Met The Standards For Satisfactory Performance.

6.4 Qualified Researchers And Auditors Should, Under Limited And Controlled Conditions, Be Accorded Access To Participant Records Provided That No Identifying Characteristics Of Individual Participants Be Used In Any Report.

6.5 Notwithstanding The General Provision Of Confidentiality Afforded Participant Communications, Diversion Personnel Should Avoid Becoming Accessories To Criminal Acts Committed By A Participant Once Enrolled And Communicated Wittingly Or Unwittingly During The Course Of The Diversion Process.

STANDARD 6.1 Since There Must Be A Relationship Of Trust Between The Diversion Program And The Participant For Program Services To Have A Positive Effect, Diversion Programs Should Specify To The Prospective Participant At time Of Entry Precisely What Information

Might Be Released, In What Form It might Be Released, And To Whom It Might Be Released, Both During And After Program Participation. As A General Rule, Information Gathered In The Course Of The Diversion Process Should Be Considered Confidential And Not Be Released Without The Participant's Prior Consent.

COMMENTARY

For the habilitation process to achieve the desired results, it is essential that the divertee be willing to relate to diversion staff with openness and candor. Quite apart from the adverse impact on the helping process of lack of trust, since the basic assessment of how well the divertee is doing in the program is usually the counselor's to make, the status of the participant may be jeopardized by unfavorable progress reports to the criminal justice system if he holds back. Yet, when this type of information is shared, legal and ethical difficulties arise concerning the confidential aspect of such information.[1]

Consequently, programs should advise defendants from the initial point of contact exactly how all communications will be handled. It should be made clear to the defendant at the time of screening or intake that he has a right to privacy but that diversion enrollment and participation are contingent upon the release of certain information to outside parties—defense counsel, the prosecutor, and perhaps the court. The program should attempt to be as specific as possible with the prospective participant about what sort of information the criminal justice system will be receiving.

Standard release of information forms should be presented for the defendant's review at the time of enrollment. Once executed, they should accompany or be incorporated into the participant's enrollment agreement with the program and should state what information will be released by way of progress reports and which officials will be recipients. The participant's consent to the release of the specified information should be in writing and the opportunity to confer with counsel should first be afforded.

These general principles of confidentiality, with the exceptions listed above (release of some information to the criminal justice system) are of particular importance as they relate to agents outside the program and the criminal justice system.

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[1] For an extended discussion of such legal and ethical problems in the context of diversion, *see* Zaloom, J., Pretrial Intervention Under New Jersey Court Rule 3:28 Proposed Guidelines for Operation, CRIMINAL JUSTICE QUARTERLY, vol. 2, no. 4 (Fall, 1974), reprinted (and repaginated) as ABA Pretrial Intervention Service Center, Pretrial Intervention Article Reprint No. 2 (January, 1975) at 25-26 (hereinafter cited as Zaloom); Jaszi, P., and Pearlman, H., LEGAL ISSUES IN ADDICT DIVERSION: A TECHNICAL ANALYSIS 98-120 (Drug Abuse Council, Inc. and ABA Corrections Commission, 1975) (hereinafter cited as Jaszi & Pearlman); and ABA Pretrial Intervention Service Center, PRETRIAL INTERVENTION LEGAL ISSUES, A GUIDE TO POLICY DEVELOPMENT 36-38, 49 (Washington, D.C., 1977) (hereinafter cited as PRETRIAL INTERVENTION LEGAL ISSUES).

While special provisions should be made for researchers and auditors (see Standard 6.4 and related *Commentary*), the caution with which any information should be released is reviewed in the standing Resolution passed by the membership of the National Association of Pretrial Services Agencies (NAPSA) in 1974, which states in full:

> Resolved: That information received and collected by the program shall not be released to any agency or individual that will use the information for dissemination to the general public or be recorded in a computer system that has the potential for connection with national computer files or be used by a law enforcement agency for the purposes of surveillance and investigation.
>
> Resolved: That any information obtained in the course of such investigation shall be confidential except for purposes of pretrial release considerations and shall not be released to any individual or agency without permission from the defendant after advice and consent of counsel.[2]

Consequently, when information is requested by outside parties such as potential employers, creditors, social welfare agencies, *etc.*, diversion programs should limit access to participant information to summary extracts of only that data which is required to satisfy the seeker's legitimate need to know. Under no circumstances should raw data, such as a counselor's original notes, be released to outside parties, and under no circumstances should the custody of the participant's original records (casework file, *etc.*) leave the physical confines of the program. Further, the recipient of any information should be required to agree in advance, in writing, to (1) specify the purpose for which it will utilize the information obtained from the diversion program and (2) not to release such data to third parties without the participant's prior consent. The general thrust of these guidelines is not unique. They are in keeping with, for instance, the *California Labor Code*, (Section 432.7), which states that:

"a) No employer whether a public agency or private individual or corporation shall ask an applicant for employment to disclose, through any written form or verbally, information concerning an arrest or detention which did not result in conviction."[3]

Likewise, Section 5 of the *Arkansas Pretrial Diversion Act* requires that:

> [a]ny person charged under the provisions of this Act with keeping the confidential records of first offenders as provided in Section 1 hereof shall, upon divulging any information contained in such records to any person

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[2] For the full text of the Resolution, *see* National Association of Pretrial Services Agencies (NAPSA) and National Center for State Courts (NCSC), FINAL REPORT: 1974 NATIONAL CONFERENCE ON PRETRIAL RELEASE AND DIVERSION 39-40 (Denver, Colorado, July, 1974).

[3] In this regard, *see Gregory* v. *Litton Systems, Inc.*, 472 F.2d 631 (9th Cir. 1972) and *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971) (inquiry by employers into *arrest* records as distinct from *conviction* records) are civil rights violations because minority job applicants are statistically more likely to have been arrested than white applicants). *See generally* Note *Discrimination on the Basis of Arrest Records*, 56 Cornell L. REV. 470 (1971).

or agency other than a law enforcement officer or judicial officer, upon conviction be guilty of a misdemeanor and shall be subject to a fine of not more than $500.00. Each such violation shall be considered a separate offense.[4]

In addition to the above considerations, federal regulations enacted in 1975 governing access to and dissemination of criminal disposition information may have direct applicability to some diversion programs. Section 524(b) of the Crime Control Act of 1973 required LEAA to draft and issue certain privacy and security requlations. These regulations,[5] issued May 20, 1975, govern any State, county or local criminal justice agency except courts which have received LEAA funding specifically for the purpose of collecting, storing or disseminating "criminal history record information."[6] While diversion programs which are under the administrative control of the courts are exempt from these restrictions, private programs receiving LEAA funds for management information systems and diversion programs which are units of prosecutors' offices, probation departments or executive branch agencies may well fall within the parameters.

Generally speaking, the LEAA regulations are designed to govern the dissemination of criminal conviction data. Dissemination of information about pending cases, continued cases and dismissals starting in 1978, were strictly limited for agencies which come under the purview of the regulations. As the LEAA manual explaining the privacy regulations points out,

> . . . after December 31, 1977, nonconviction data may not be given out for noncriminal justice purposes unless authorized by statute, ordinance, executive order, or court order or rule. Since non-conviction data includes in-

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[4] Act 346, "The Arkansas Pretrial Diversion Act of 1975," § 5, *reprinted in* ABA Pretrial Intervention Service Center, AUTHORIZATION TECHNIQUES FOR PRETRIAL INTERVENTION PROGRAMS: A SURVIVAL KIT, at Appendix D (Washington, D.C. 1977) (hereinafter cited as SURVIVAL KIT).

[5] 28 CFR Part 20. The Regulations were significantly amended on March 19, 1976 and the amendments published in 41 FR 11714.

[6] According to § 20.3 (b) of the LEAA Regulations, "Criminal history record information" is defined as

> information collected by criminal justice agencies on individuals, consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, sentencing, correctional supervision and release. The term does not include identification information such as fingerprint records or photographs to the extent that such information does not indicate involvement of the individual in the criminal justice system.

However, it is important to bear in mind that, as a recent LEAA publication on the subject states, "[t]he regulations specifically exclude certain types of information that might otherwise be included within the definition of criminal history record information", including "original records of entry such as police blotters maintained by criminal justice agencies, compiled chronologically and required by law or long-standing custom to be made public, if such records are accessed solely on a chronological basis", as well as "court records of public judicial proceedings" and "published court or administrative opinions and proceedings". *See* U.S. Department of Justice, LEAA, National Criminal Justice Information and Statistics Service, *Privacy and Security Planning Instructions, Criminal Justice Information Systems* 10 (Revised ed., April, 1976) (hereinafter cited as *LEAA Privacy Instructions*).

> formation relating to year-old arrests that have not resulted in a disposition and are not still under active prosecution . . ., information relating to such 'pending' arrests may not be given out, absent appropriate legal authority (as set out in Section 20.21(b)(2)). If the individual is acquitted, or if charges are not brought or are dismissed or indefinitely postponed, information concerning such arrests also may not be released to non-criminal justice recipients unless authorized in accordance with Section 20.21(b)(2). . .[7]

On the basis of the above, certain diversion programs may be limited in providing information about successful divertees' dismissals to present and prospective employers and other parties having a legitimate interest in this information but who are outside the criminal justice system, unless specific provisions of State or local law allow for such.

STANDARD 6.2 Programs Should Strive To Guarantee, By Means Of Interagency Operating Agreements Or Otherwise, That No Information Gathered In The Course Of A Diversion Application Or Participation In A Diversion Program Will Be Admissible As Evidence In The Case For Which Diverted Or In Any Subsequent Civil, Criminal Or Administrative Proceeding.

COMMENTARY

As indicated by the National Legal Aid and Defender's Association in its National Colloquium on the Future of Defender Services:

> The self-incriminating rights of a defendant are neither expressly nor impliedly waived by his entry or application for diversion. Nor should they be. The primary, valid purpose of a diversion program is to offer a potentially more effective correctional option to the defendant. The process is not intended to augment indirectly the state's ability to convict should the defendant fail to complete the program successfully, or to augment prosecution on other charges.[8]

It is suggested in Standards 2.6, 4.3, and 5.5 that prospective or enrolled defendants be allowed to challenge a termination decision made by the diversion program. Courts in at least two states have issued rulings which take this position.[9] In the course of such possible reviews, and in any case where the diversion program terminates the defendant, information possibly damaging to the defendant may have been elicited.[10]

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[7] *LEAA Privacy Instructions, supra* note 6, at 14.

[8] National Legal Aid and Defender Association, *National Colloquium on the Future of Defense Services*, Chapter VI, "The Defense Attorney's Role in Plea Bargaining and Diversion" (Chicago, Ill. 1974).

[9] *Kramer* v. *Municipal Court*, 49 Cal. App. 3d 418 (1975); *State* v. *Ledding*, 158 N.J. Super. 209 (Law Div., 1978).

[10] *See* Zaloom, *supra* note 1, at 25. *See also* Standards 5.2, 5.4, and 5.5, *infra*, and accompanying commentary.

As is discussed below, few measures adequately ensure that information gathered by a diversion program cannot be admitted as evidence. Therefore, at the very minimum, some mechanism should be created to ensure that information gathered during the course of diversion is not admissible later on, on the issue of guilt or innocence, if the participant is terminated from the diversion program and returned for prosecution in the normal course. In the absence of a statute[11] or court rule providing for such, the diversion program should secure an interagency operating agreement with the prosecutor and the court which guarantees confidentiality.

In certain cases, courts have barred the introduction of sensitive information gathered by pretrial services programs into evidence based on only an implied promise of confidentiality.[12] While these cases may provide the basis for programs to resist subpoenas of program records when they do not enjoy formal guarantees of confidentiality, all courts will not be as sensitive to public policy considerations which support such a position. Moreover, programs should not rely solely on court support for protection of program records.[13]

Further, formal guarantees that diversion information will not be admissible on the issue of the participant's guilt or innocence on the diverted case do not satisfactorily address other problems which might arise later on.[14] For example, they do not protect against a prosecutor's using information received about the defendant from the diversion program to impeach his credibility as a witness if the defendant takes the stand either in the case where prosecution against him on the diverted charges is resumed or where he should appear as a witness for a co-defendant or

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[11] A few of the state diversion statutes address this issue. *See* §§ 1 and 3 of the Arkansas Pretrial Diversion Act, § 5 of the Massachusetts Act, and § 4(a) of the Tennessee Act, as reprinted in SURVIVAL KIT, *supra* note 4, at Appendix D. (The Massachusetts provision is quoted in full at note 12, Chapter V, *infra*.) The Tennessee provision states that

> The memorandum of understanding [signed by the parties at the time the defendant is diverted] may include stipulations concerning the admissability in evidence of specific testimony, evidence, or depositions if the suspension of prosecution is terminated and there is a trial on the charge, however, no confession or admission against interest of the defendant obtained during the pendency of and relative to the charges contained in the memorandum of understanding shall be admissable in evidence for any purpose, including cross-examination of the defendant.

[12] *See, e.g., In the Interest of J.P.B.* 143 N.J. Super. 96 (App. Div. 1976); *State* v. *Winston*, 219 NW 2d 617 (Minn. Supreme Ct., 1974); *State* v. *Williams*, 343 A.2d 29233 (N.H. App., 1975).

[13] In this regard, it is instructive that within 30 days of the New Hampshire appeals court's decision in the *Williams* case to the effect that information obtained in a pretrial release interview could not be subpoenaed and used against the interviewed defendant's interest at trial, the New York Supreme Court came to the opposite conclusion in *People* v. *Rodriquez*, (N.Y. Sup. Ct., App. Div., 1975). Neither the New Hampshire nor the New York pretrial release interview confidentiality guarantees were embodied in statutes; instead, both were based on local agency policy only.

[14] The New Jersey Court Rule 3:28 (c)(4) and Guideline No. 5, as well as the Massachusetts, Tennessee and Arkansas Statutes, each attempt to address as many of these spin-off problems as possible, with varying degrees of comprehensiveness. *See* note 6, *infra*, as well as note 12, Chapter V.

other person. Further, this sort of limited guarantee does not prevent the prosecutor from using information derived from the diversion program to develop leads against the interests of the defendant with regard to other possible crimes or to present this information to a grand jury for indictment on other, unrelated charges.

A broader guarantee, therefore, is recommended, similar to that embodied in Guideline No. 5 of the *New Jersey Supreme Court's 1976 Guidelines for the Operation of Pretrial Intervention Programs.*[15] That provision bars the introduction of any information gathered during the diversion process in any subsequent proceeding, whether criminal or not, on any matter—not just the participant's guilt or innocence on the diverted case—where the introduction of the information would be contrary to the defendant's interests.

When devising such a broad guarantee, close attention should be paid to existing Federal laws requiring confidentiality of information for all substance abusers in federal, state and local treatment programs. Section 408 of the *Drug Abuse Office and Treatment Act of 1972*[16] protects confidential communications by drug and alcohol abusers made during the course of service delivery and bars release of such information by the treatment program to outside parties except as authorized by the Statute and interpretive regulations promulgated pursuant thereto. The Regulations in question[17] are comprehensive and delineate what is required for a knowing and voluntary release of confidential information[18] to outside parties; including criminal justice agencies to which such releases may be made.[19] Procedures for resisting unauthorized information requests, including legal subpoenas not tested by adversary court hearings, are also included.[20]

Aside from serving as a useful model when drafting confidentiality laws to govern pretrial diversion generally, the Federal Drug and Alcohol Confidentiality Regulations can be relied upon by pretrial diversion programs which do not enjoy broad confidentiality guarantees specific to the diversion process whenever they are attempting to protect the confidentiality of divertees who happen to be alcohol or drug abusers, even if the substance abuse is incidental to the diversion process.[21]

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[15] *See* note 12, Chapter V, *infra*, for the text of the New Jersey Court Rule provision and interpretive *Guidelines* provision in this regard.

[16] 21 U.S.C. § 1175, as amended.

[17] 42 CFR Part 2. The Regulations appeared in the Federal Register for Tuesday, July 1, 1975. *See* 40 FR 27802 *et seq.*

[18] 42 CFR §§ 2.18, 2.18-1, 2.31, 2.31-1.

[19] 42 CFR §§ 2.32, 2.35, 2.39.

[20] 42 CFR §§ 2.61-2.66-1.

[21] *See* 42 CFR §§ 2.11 (i), (k), 2.39. This point is stressed in Bellassai, J., *Protecting the Confidential Communications of Substance Abusers in Pretrial Programs: The Broad Mandate of Federal Law*, a paper presented at the 1977 Annual Conference on Pretrial Release and Diversion held in Arlington, Virginia, May 10-13, 1977, and published in *Resource Materials, 1977 Annual Conference on Pretrial Release and Diversion*, at Tab "J" (NAPSA and Pretrial Services Resource Center, 1977).

In summary, while the diversion option may produce information about defendants that might help the prosecutor's case should the defendant be returned to court, such information should not be admissible as evidence against the defendant. This is essential because:

- in keeping with the general philosophy presented in these Standards, the purpose of diversion is not to work as a lever to strengthen the state's case against the defendant; and
- the program's credibility with defendants would be seriously jeopardized.

In the absence of statutory safeguards protecting the confidentiality of communications between diversion program staff and participants, formal agreements should exist between the criminal justice system and the program to protect such communications. Defendants should be informed of the existence of such agreements and any limitations on absolute confidentiality which they allow before enrollment in the diversion program.

STANDARD 6.3 Guidelines Treating The Types Of Information To Be Contained In Reports To Be Released To Criminal Justice Agencies To Support A Dismissal Recommendation Should Be Developed. Such Reports Should Be Limited To Information Which Is Verified And Necessary To Determine Whether The Participant Has Met The Standards Necessary For Satisfactory Performance.

COMMENTARY

These Standards elsewhere recognize that certain information needs to be conveyed to the criminal justice system when a dismissal recommendation is made by the diversion program.[22] This point is addressed here because of the need to reconcile basic information release with the divertee's legitimate right to privacy during (as distinct from after) the diversion process. Both prosecutor and defense counsel have legitimate needs for summary reports on divertee progress in order to fulfill properly their responsibilities. Defense counsel must continue throughout the diversion phase to represent his client's interests and safeguard his rights until the point of dismissal or, even more so, if, and when, return to regular prosecution occurs. The prosecutor, on the other hand, must satisfy himself that the defendant is responding satisfactorily to the diversion program and that the record of compliance with diversion requirements has been sufficient to warrant recommending dismissal or entering a *nolle prosequi*, depending on local procedure.

In those jurisdictions in which the judiciary plays an active role in the diversion process the court must have access to information sufficient to support its entry of a dismissal on the record. The question, then, remains; what types of information should be conveyed, and how much.

It is recommended that verified information pertaining to fulfillment of the contract between the diversion program and the defendant be con-

[22] See Standards 4.2, 5.2, *infra*, and accompanying notes and commentary.

veyed. Subjective or personal opinions should be avoided. Facts irrelevant to completion of the service contract should also be omitted, unless these positively contribute to a general assessment of the defendant's situation and enable the decision-maker to reach an informed conclusion.

In keeping with Standard 6.1, the prospective divertee should be informed of the types of information which will be conveyed to the court upon program completion. It is also recommended that programs seek an agreement in writing with the court of the types and contents of the reports which should be submitted for dismissal recommendations.

STANDARD 6.4 Qualified Researchers And Auditors Should, Under Limited And Controlled Conditions, Be Accorded Access To Participant Records Provided That No Identifying Characteristics Of Individual Participants Be Used In Any Report.

COMMENTARY

While most of the provisions cited above apply to criminal justice agencies and exclude (unless stringent guidelines are provided) other parties, two additional groups may need to gain access to participant records—researchers and auditors.

Auditors should be allowed to canvas information on diversion and service program activities in order to assess whether proper expenditure of funds by the program has occurred. Not only does this ensure that the diversion program is following the rules of good fiscal management, but it allows the program to develop credibility, augmenting its chances for continued operation. Under most circumstances, auditors will not need access to records containing personal identifiers of defendants. If and when this occurs, however, the generally recognized professional ethics of auditing prevent people engaged in this work from divulging such information. Diversion programs must therefore ensure that only reputable firms are hired to audit their records.

The same *caveat* applies to research. Researchers retained by the diversion program[23] may need access to confidential information in order to perform their duties accurately. In practice, many programs and program personnel feel uneasy about sharing individual defendant's records with or without personal identifiers. Guidelines exist, however, under the Federal Privacy Act[24] (as well as at the local level in certain states) which severely limit access to data and guard against potential abuses or mishandling of information.[25]

[23] As distinguished from in-house researchers who are regular employees of the program. In this regard, outside researchers financed *via* federal grant monies to conduct program evaluations are bound by LEAA regulations on confidentiality of research and statistical data, which are contained in 28 CFR Part 22, as published in the Federal Register for December 15, 1976. *See generally* LEAA, *Confidentiality of Research and Statistical Data* (1978).

[24] 5 U.S.C. § 552 *et seq.* (1970, Supp V, 1975).

[25] *See generally* Search Group, Inc., TECHNICAL MEMORANDUM NO. 13 (REVISED), STANDARDS FOR SECURITY AND PRIVACY OF CRIMINAL JUSTICE INFORMATION—SECOND EDITION) Sacramento, California, January, 1978).

Program administrators should familiarize themselves with provisions of the Privacy Act as well as with statutes which apply to their state or locality.[26] Readers are also urged to review the *Task Force Report on Criminal Justice Research and Development* issued by the *National Advisory Committee on Criminal Justice Standards and Goals* in this regard.[27]

Whenever programs solicit contracts from professional researchers they should require bidders to address in detail how the confidentiality of sensitive data on participants will be handled. Once a researcher has been retained, the diversion program should require explicit promises, preferably in writing and notarized, that the researcher and his agents (clerical staff, investigators, keypunch and computer personnel, *etc.*) will abide by appropriate nondisclosure conditions, as negotiated.[28] Such agreements should specify that unnecessary data items will not be collected and that sensitive data containing personal identifiers will not be extracted from participant records unless essential for research purposes. Where the nature of the research makes such access necessary the researcher should be required to replace direct personal identifiers with coded identifiers on all research instruments, and keep the link file (which matches personal and coded identifiers) in a secure place.[29]

Primary personal identifiers such as names and social security numbers should be removed from all materials published in the research as a matter of course and in keeping with the researchers' professional ethics. Also, care should be taken to remove secondary identifiers (bits of personalized information which, when taken alone or together with other items, suggest the identity of the subject).

Secondary records generated by researchers (data collection instruments, keypunch files, computer tapes and printouts, *etc.*) which contain personal identifiers should be destroyed when the need for them has passed. Until such time, unauthorized access should be strictly controlled by the researcher.

STANDARD 6.5 Notwithstanding The General Provision Of Confidentiality Afforded Participant Communications, Diversion Personnel Should Avoid Becoming Accessories To Criminal Acts Committed By A Participant Once Enrolled And Communicated Wittingly Or Unwittingly During The Course Of The Diversion Process.

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[26] *See Generally* Office of Legal Counsel, LEAA, *Compendium of State Laws Governing the Privacy and Security of Criminal Justice Information* (1975); and *Hearings on Criminal Justice Data Banks Before the Subcomm. on Constitutional Rights of the Senate Committee on the Judiciary*, 93rd Cong. 2d Sess. (1974) at 715-976.

[27] Recommendation 2.3 of the Task Force Report, *Protecting Sensitive Data Files*, provides that "Criminal justice R&D funding agencies should require that funded researchers who collect or receive sensitive data will use suitable procedures for protecting those data." *Id.* at 43.

[28] *See Confidentiality of Research and Statistical Data, supra* note 23, at 22-25, 29-33.

[29] *Confidentiality of Research and Statistical Data, supra* note 23, at 16-17.

COMMENTARY

Diversion programs should ensure that the counselor/divertee privilege which they enjoy by reason of legislation, court rule, or interagency operating agreement is not misused to cloak illegal actions committed by a divertee once enrolled. Few existing confidentiality guarantees are by their wording so broad as even to suggest that a program is barred from informing law enforcement officials of crimes committed or planned by participants apart from the alleged offense for which diverted. Most guarantee only that information obtained during the diversion process will not be admissible on the issue of the defendant's guilt or innocence in the case for which diverted, should termination and return to prosecution occur. Guideline Number 5 promulgated by the New Jersey Supreme Court and cited in the above *Commentary*,[30] goes a good deal further when it states that "*no information* . . . obtained as a result of a defendant's application to or participation in a pretrial intervention program should be used in any subsequent proceeding against his or her advantage."[31] (Emphasis added.) Such a guarantee is rare.

It is unlikely that legislatures, courts or other criminal justice entities promulgating confidentiality guidelines for diversion programs intended or ever intend that the therapist/patient privilege so created should be broader than the traditional lawyer/client privilege. In this regard it is important to note that the American Bar Association Code of Professional Responsibility does not consider the lawyer/client privilege to be absolute, like the husband/wife or priest/penitent privileges, when it comes to issues such as the duty to reveal information about illegal activities by the client which are apart from the case in which the lawyer is representing the defendant. ABA Disciplinary Rule 4-101, *Preservation of the Confidences and Secrets of a Client*, makes a specific exception when it allows for disclosure by the lawyer of "(3) the intention of his client to commit a crime and the information necessary to prevent the crime."[32]

Further provisions of the ABA Code make it clear that whether to reveal such information is not a matter of discretion for the attorney, but an affirmative duty. Disciplinary Rule 7-102, *Representing a Client Within the Bounds of the Law*, states "(A) In his representation of a client, a lawyer shall not: . . . (3) conceal or knowingly fail to disclose that which he is required by law to reveal."[33]

A 1965 Advisory Opinion on this controversial point by the ABA Committee on Professional Ethics stated that a lawyer must reveal a confidential communication from his client where "the facts in the attorney's

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[30] The *Guidelines*, promulgated in 1976 by the New Jersey Supreme Court, are reproduced in their entirety in the body of the Court's *Leonardis I* decision, 71 N.J. 85 (1976).

[31] *See* note 10, Chapter V, *infra*, and accompanying text.

[32] American Bar Association, Code of PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, 22C (December, 1974 ed.) (hereinafter cited as ABA Code of Professional Responsibility).

[33] ABA code of PROFESSIONAL RESPONSIBILITY, *supra* note 32, at 36C.

possession indicate beyond reasonable doubt that a crime will be committed."[34] The damage to a program's credibility with other justice system agencies, not to mention the possibility of criminal prosecution of staff members who fail to come forward with such information, are strong practical considerations which argue against a program's taking the position that an existing counselor/divertee privilege which it enjoys extends this far—unless the letter of the statute or a court decision in its jurisdiction says so directly.

Apart from the philosophical question of whether the counselor/divertee privilege should be so broad as to protect communications about past crimes or planned crimes, many programs function within the criminal justice system—as part of a prosecutor or defender office, under a court or probation department—and this precludes their taking such a stance. Where programs are administratively controlled by criminal justice agencies, and program staff are thereby agents of the larger entity, it is doubtful that a different standard of accountability on this issue would be applied to them from that applied to other employees. (For example, where prosecutors and defense attorneys are officers of the court whose oaths preclude them from withholding the sort of information under discussion, judges in test cases cannot be expected to apply a different public policy standard to diversion staff of such agencies.)

A separate but related question which acquires significance here is whether the counselor/divertee privilege created by legislation, court rule or interagency agreement and applied to pretrial diversion is the defendant's to exercise, or the program's, or both. For example, where a defendant volunteers information to a third party which he previously communicated to his lawyer in confidence, the lawyer/client privilege in most states is considered to have been waived, since it is the client's privilege to begin with. If the same rationale applies to therapist/patient privileges, then a later admission to law enforcement personnel by a divertee that he committed a particular crime could be a waiver of the privilege for the diversion program. Diversion staff members might then become liable for subpoena about previous statements made by the divertee concerning the crime. Again, unless the enabling authority for the confidentiality guarantee in the particular jurisdiction clearly provides that it extends to statements about criminal activity, diversion staff could find themselves facing criminal prosecution as accessories before or after the fact to the crime committed by the participant who made it known to them.

In order to avoid these dangerous entanglements, in the absence of a clear absolute privilege, it is recommended that programs do the following:

a) Clearly outline the role differences between counseling staff and attorney staff; a few programs have on-staff attorneys who represent diversion participants. Furthermore, as stated throughout these Standards, the duties and tasks of the defense attorney and those of

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[34] ABA opinion 314 (1965). *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 32, at 23C and note 16.

the helping services worker are fundamentally distinct. Counselors (and other service delivery staff) and attorneys do not have the same mandate, training, or responsibilities. These respective responsibilities should be spelled out with regard to handling confidential communications as well as in other areas where role conflict or confusion is likely.

b) Diversion program staff should inform each participant upon entry that the program cannot keep confidential any information communicated by the divertee about crimes committed or planned, once the defendant is enrolled in the program. This leads to two separate considerations.

(1) If the divertee is rearrested while participating in the program, and if—as is the case in most situations—such rearrest constitutes a potential violation of program conditions—the rearrest is part of the public record and will be handled by the program under its general guidelines stipulated at entry. (This situation is reviewed under Standard 5.4.)

An important question remains, however. What happens when the divertee is rearrested and acknowledges guilt to his counselor? Does the counselor, now in possession of this information, become liable if he does not transfer the information to the law enforcement authorities? Unless statutes protect the counselor/participant privilege, the program should advise the defendant that he should not share this type of information with his counselor. This lack of statutory privilege is obviously harmful to pretrial diversion programs in the accomplishment of their mandate, since relationships of trust are difficult to develop when various ground rules limit the openness and candor a participant can safely display. Further, programs can face an uncomfortable dilemma when attempting to be responsible towards the court and effective with the divertees, all the while facing the possibility of subpoenas for records, or conversations. For these reasons, all attempts should be made to develop interagency agreements or, preferably, legislation protecting this relationship and spelling out its parameters.

(2) On the other hand, a divertee may "confess" to a crime (precedent to or during participation in the diversion program) which did not lead to an arrest. The diversion program staff is neither equipped for nor capable of investigating whether such crime actually occurred, nor are they trained to advise the defendant about his legal rights in this situation.

It is therefore advised that in this situation, the diversion program inform its participants in advance that it will refuse to consider or listen to such spontaneous "confessions", specifics of alleged crimes or descriptions of situations which suppose the commitment of illegal acts. Further, the defendant should be automatically referred, under those circumstances, to his defense attorney for advice. Finally, an understanding with other criminal justice agencies confirming that the diversion program will take such a stance in those situations should be reduced to writing.

Although the likelihood of these types of events may be slight, a single such occurrence could severely damage the diversion program's credibility and even its continuation. Situations may also arise where the diversion program no longer feels capable of assisting a divertee. For example, the defendant may have a compulsive need to alleviate his guilt for undetected crimes. The program staff cannot allow such dialogue. Service delivery thereupon becomes impossible. In such instances, administrative termination of the divertee for inability to complete the program is the recommended course to take.

STANDARDS

7.1 Pretrial Diversion Programs Should Monitor, Research, and Evaluate The Performance And Practices Of Their Programs.

7.2 Problems And Hypotheses In Research And Evaluation Methodologies Should Be Consistent With The Goals Of The Individual Diversion Agency And The Concepts Of Diversion In General.

7.3 Research And Evaluation Should:

- Follow Methodology Which Is Appropriate To The Program In Order To Generate Credible Results;
- Follow A Format Which Can Be Easily Communicated And Understood;
- Be Conducted By Individuals With Appropriate Expertise.

STANDARD 7.1 Pretrial Diversion Programs Should Monitor, Research, And Evaluate The Performance And Practices Of Their Programs.

COMMENTARY

From their inception, diversion programs should make provisions for ongoing review of their efforts. While all programs do not have the capacity to undertake or pay for all the formats suggested below, it is essential that they, at a minimum:

- Determine what data is needed and how it is to be collected;
- Keep the data necessary for undertaking additional research efforts that may take place at a later date;
- Seek support and monies for a comprehensive review of program efforts.

Too often evaluation has tended to be tacked on to diversion with a part-time consultant brought in after the start of the project to conduct it. A delivery system or individual program eventually suffers when the claims which it makes remain unsubstantiated or when the results proffered can be easily attacked. More specifically, pretrial diversion has been criticized by many observers because good research does not exist to

validate the concept.[1] Such criticism, if it continues, is bound to have an impact on local agencies who have not undertaken their own evaluations.[2]

The broad term research actually encompasses several levels of undertakings:

a) *Monitoring*—the ongoing data collection by a program through a management information system. It allows the program to gather data to review the day-to-day performance of the pretrial diversion staff and the progress of the program's divertees.

b) *Specialized research*—an examination of specific problems about divertee activity or program impact in certain areas. Examples of specialized research include the examination of alternative forms of counseling participants; examination of state-wide diversion practices; review of the quality of services provided by various referral agencies; *etc.* Specialized research generally takes place as problems manifest themselves in an agency, or when a decision is made to reorient current practices.

c) *Evaluation*—an examination of the effectiveness of the program based upon its identified objectives. It includes such things as:
   - determining the goals and objectives of the program;
   - translating those goals into indicators; and
   - collecting data on the indicators to determine how well the agency is meeting its goals.

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[1] *See, e.g.*, Kirby, M., FINDINGS 2: RECENT RESEARCH FINDINGS IN PRETRIAL DIVERSION 1-10, 29-30 (Pretrial Services Resource Center, 1978) (hereinafter cited as Kirby); Aaronson, D., *et al*, THE NEW JUSTICE: ALTERNATIVES TO CONVENTIONAL CRIMINAL ADJUDICATION 23 (LEAA, 1977) (hereinafter cited as NEW JUSTICE); Johnson, P., *Pretrial Intervention: The Administration of Discretion*, 1, reprinted in Resource Materials, 1977 ANNUAL CONFERENCE ON PRETRIAL RELEASE AND DIVERSION, Arlington, Virginia, May 10-13, 1977 (NAPSA and PSRC, 1977) (hereinafter cited as Johnson); Abt Associates, Inc., PRE-TRIAL INTERVENTION, A PROGRAM EVALUATION OF NINE MANPOWER-BASED PRE-TRIAL INTERVENTION PROJECTS (U.S. Dep't. of Labor, 1974) (hereinafter cited as Abt Report); Rovner-Pieczenik, R., PRETRIAL INTERVENTION STRATEGIES: AN EVALUATION OF POLICY-RELATED RESEARCH AND POLICYMAKER PERCEPTIONS xv-xvi (ABA Corrections Commission, 1974) (hereinafter cited as Rovner-Pieczenik); Mullen, J., THE DILEMMA OF DIVERSION: RESOURCE MATERIALS ON ADULT PRE-TRIAL INTERVENTION PROGRAMS 23, 37-47 (LEAA, 1974) (hereinafter cited as Mullen); and Zimring, F., *Measuring the Impact of Pretrial Diversion from the Criminal Justice System*, 41 Univ. Chicago L. Rev. 224, (1974) (hereinafter cited as Zimring).

[2] In this regard, a major recent study of pretrial alternatives recommended the following:

> *Recommendation No. 4.* Some appropriate funding agency or organization should sponsor a comprehensive analysis of evaluation efforts in the realm of alternatives to conventional adjudication, similar to LEAA's National Evaluation Plan, Phase I, and to the National Science Foundation's 37 projects assessing policy-related research in areas of public policy.
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> *Recommendation No. 6.* State and regional planning bodies (including budget offices and regional crime-planning agencies) should be encouraged to create advisory panels of experts to provide both general direaction to the plannning agencies' evaluation efforts and guidance on individual evaluations.

NEW JUSTICE, *supra* note 1, at 24.

Evaluation can measure the effectiveness of the organization and lead to suggestions for modification in program activities.[3] Given its intensity, it usually takes place every five years or so, unless a program crisis suggests an earlier need. Evaluation should be conducted by a source outside of the program. It requires major program resources of funding and staff time to provide the evaluator with the necessary data and information.[4]

The case for the need for good research is so compelling it need not be expanded upon. The following discussion is a summary of the benefits, as well as of the limitations, of research.[5]

Some, or all, of the approaches listed above (*e.g.* monitoring, specialized research and evaluation) can help diversion programs to make sophisticated and informed program decisions. The systematic use of research and evaluation can dramatically improve the delivery of services to defendants and program impact on the courts. An innovative program administrator sees himself as committed to the concept of program improvement, not to a particular practice. If research shows the program to be ineffective, the innovative administrator should plan program modifications which might be more successful.

Further, many diversion programs face constraints by the courts, prosecutors, and community sentiment, on the types of defendants which they can divert. Too often diversion of defendants is restricted to those faced with minor charges. Specialized research can be used to examine the impact which diversion has or can have on defendants charged with more serious crimes.[6]

Research and evaluation can also be of help to the issue of survival of diversion programs. For instance, pretrial diversion agencies can be crippled if a sensational event involving one of its participants is publicized by opponents to discredit program activities. These types of events inevitably occur and can be overcome only if prior research can demonstrate the viability of the program. Furthermore, funding agencies generally require an evaluation to determine whether further funding is justified.[7] Many programs discover that in order to survive their initial

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[3] Kirby, *supra* note 1, at 7-8. *See also* Rovner-Pieczenik, *supra* note 1, at *xix-xx* (implications for policy-maker planning to be derived from good pretrial diversion research and evaluation).

[4] Adams, S., EVALUATIVE RESEARCH IN CORRECTIONS: A PRACTICAL GUIDE, 64 (LEAA, 1975) (hereinafter cited as Adams); NEW JUSTICE, *supra* note 1, at 24.

[5] *See generally* on this point Adams, *supra* note 4, and Bennet, C., & Lumsdaine, A., (ed.) EVALUATION AND EXPERIMENT (New York, Academic Press, 1975) (hereinafter cited as Bennet & Lumsdaine).

[6] In this regard, *see* Beeson, P., and McMasters, E., *The Multi-Purpose Comparison Group: An Effective Evaluation Tool for Diversion*, in PRETRIAL SERVICES ANNUAL JOURNAL, 1978, 56 (Pretrial Services Resource Center, 1978) (hereinafter cited as Beeson & McMasters). For a discussion of the utility of specialized diversion research for other subpopulations, notably females, *see* Kirby, *supra* note 1, at 23-25.

[7] In recent years this has become routine practice for State Planning Agencies (SPA's), which dispense LEAA block grants (long the prime source of diversion pilot program funding), not to mention LEAA itself, in the award of discretionary grant funds.

phase, rigorous evaluation which demonstrates the program's impact is necessary. In these cases a cost effectiveness study should be included in the evaluation.[8]

Evaluations, popular or useful as they may be, should not be undertaken under certain conditions. Evaluation is desirable only when the potential "payoff" for obtaining the information outweighs the costs involved and the consequences of operating without that information. Also, the difficulties in completing an evaluation should be considered. Problems which may affect or prevent completion of the study include such items as:

1) non-adherence to projected schedules;
2) loss of project focus as new tasks emerge;
3) impossibility of maintaining the purity of comparison activity; and
4) technical difficulties in collecting the data.

When some or all of these problems occur, diversion programs then need to re-evaluate the cost effective and cost benefit factors before deciding whether to continue the evaluation.

STANDARD 7.2 Problems And Hypotheses In Research And Evaluation Methodologies Should Be Consistent With The Goals Of the Individual Diversion Agency And The Concepts Of Diversion In General.

COMMENTARY

In order to justify their existence, pretrial diversion agencies too often have made exaggerated claims as to their possible impact. They include:

- substantial reduction of court backlog;
- cost savings when compared with traditional criminal justice system approaches;
- time savings of judges, prosecutors, defense counsel and other court personnel;
- impact on recidivism; and
- higher employment levels and/or earnings for diverted defendants who are enrolled in and complete the program.

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[8] Kirby, *supra* note 1, at notes 48-50 and accompanying text. For discussions of the format and extent of cost effectiveness studies in pretrial diversion, *see generally* Watkins, A., COST ANALYSIS OF CORRECTIONAL STANDARDS—PRETRIAL DIVERSION (LEAA, 1975) (hereinafter cited as Watkins); Holahan, J., A BENEFIT-COST ANALYSIS OF PROJECT CROSSROADS (Nat'l Comm. for Children & Youth, Washington, D.C., 1971) (hereinafter cited as Holahan); and Kirby, M., and Corum, D., "Cost Effectiveness Analysis: A Case Study", in *The Bellringer*, III (November, 1977) (hereinafter cited as Kirby & Corum). *See also* Rovner-Pieczenik, *supra* note 1, at 92-104, and ABA Pretrial Intervention Service Center, PRETRIAL INTERVENTION SERVICES: A GUIDE FOR PROGRAM DEVELOPMENT 32-42 (Washington, D.C., 1977) (hereinafter cited as ABA Program Development Guide).

Empirical verification that all these claims have been met is nonexistent.[9] Poor methodology, undefined variables and over-statement of objectives contribute to the lack of favorable data. While some of these claims have been met by individual programs, the problems cited above have cast doubt upon the overall achievements of the diversion option when measured in such limiting terms.[10] These Standards suggest a certain format for and definition of the diversion option. They also suggest that diversion represents a choice no less viable than others as long as cost, recidivism, *etc.*, are not *increased.*[11] This is the philosophical approach, and these mininum objectives require substantiation. Furthermore, the political reality of wanting to reduce costs, recidivism, *etc.*, through diversion is not negated by these Standards. On the contrary, they are encouraged. But these objectives when stated need to be proved. The type of research outlined in the Standards of the National Advisory Commission are generally supported here.[12]

In addition to stating achievable objectives clearly and realistically diversion programs need to consider the following:

- Research on diversion suggests that there are clearly defined variables for which data can and should be gathered. Recidivism, wage

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[9] As one earlier commentator (1974) noted, "[r]egrettably, enthusiasm for diversion has grown with surprisingly little validated support from the evaluation literature." Mullen, *supra* note 1, at 1. More recently (1977), Paul Johnson likewise concluded, "[t]he area of evaluation presents one of the most significant liabilities to [diversion] program survival. Misused by almost every program, evaluation efforts are uninformed, oversold and widely misconceived." Johnson, *supra* note 1, at 27.

However, as another research-trained commentator aptly concludes, "[t]he lack of appropriate research does not mean that diversion is a failure. Rather, it means that research does not exist to demonstrate whether or not diversion has an impact on clients. Unfortuantely, many have taken the interpretation that the diversion concept has been invalidated. Nothing could be further from the truth." Kirby, *supra* note 1, at 30.

In this regard it must be stressed that a wide variety of respected commentators have likewise indicted most other approaches—indeed, the entire criminal justice field—for a paucity of definitive research on what does and does not work in the areas of deterrence, crime reduction and rehabilitation. *See, e.g.*, Martinson, R., *et. al.*, REHABILITATION, RECIDIVISM, AND RESEARCH, 34 (NCCD, Hackensack, N.J., 1976); Adams, *supra* EVALUATIVE RESEARCH IN CORRECTIONS: note 4, at 63; and Banks, J., NATIONAL EVALUATION PROGRAM, PHASE I SUMMARY REPORT: EVALUATION OF INTENSIVE SPECIAL PROBATION PROJECTS, *in* (LEAA, 1977).

[10] Mullen, *supra* note 1, at 13-14, 37-47, Rovner-Piecznik, *supra* note 1, at *xviii-xx*. This point was candidly advanced in recent testimony on the pending federal diversion bill by the Director of the LEAA-funded Pretrial Services Resource Center. *See Hearings on S. 1819, The Federal Criminal Diversion Act of 1977, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 96th Cong., 2d Sess. (July 15, 1977) at 76-77 (statement of Pretrial Services Resource Center Director Madeleine L. Crohn) (hereinafter cited as Crohn).

[11] Crohn, *supra* note 10, at 77; Kirby, *supra* note 1, at 1, 29-30; Galvin, J., INSTEAD OF JAIL: PRE- AND POST-TRIAL ALTERNATIVES TO PROSECUTION III, 44 (LEAA, 1977).

[12] *See generally* National Advisory Commission on Criminal Justice Standards and Goals, THE CRIMINAL JUSTICE SYSTEM, at Standards 6.1-10.5 (data collection systems design) plus Standards 11.1-11.3 (evaluation strategies) (Washington, D.C., 1973).

and employment variables, cost benefit or cost effectiveness variables, system impact variables, and similar items are appropriate subjects for study.

- The research model should include an analysis of the items mentioned above in order to verify the impact of the diversion program on the local criminal justice system and the community. Impact may be positive in some areas, nonexistent in others, and negative in others. Armed with the information gathered, policymakers can decide whether the combination of achievements and non-achievements is satisfactory and can define the areas of change needed with more clarity.
- These variables should be precisely defined and some indication should be made as to how a particular variable should or could be measured given the data which exists in the jurisdiction. Care should be taken not to compare results, whether they be recidivism statistics or cost-benefit statistics, with other jurisdictions unless it is clear that definitions are similar. One valid comparison can be made between the defendants being treated by the diversion agency and a control or comparison group that is equivalent.[13]

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[13] Various commentators have dealt extensively with what does (and does not) constitute valid control and comparison groups for diversion evaluation purposes. *See, e.g.*, Kirby, *supra* note 1, at 7-10, 15-23; Mullen, *supra* note 1, at 10-11; Zimring, *supra* note 1. Kirby takes the view that a valid quasi-experimental design can be constructed around comparing diversion participants (both successful and unsuccessful) with comparison groups not diverted but scientifically and carefully matched, demographically and otherwise. He concludes that "[t]he quasi-experimental design, though it is only an approximation of the more certain experimental design, *can* provide reasonably accurate information if it is employed carefully". (Emphasis added.) Kirby, *supra* note 1, at 8.

Mullen, though she goes to some length to specify what would constitute arguably acceptable comparison groups, is less sure of their acceptability and *caveats* that "[d]efendants who appear—on paper—to roughly match the characteristics of eligible participants, have been selected retrospectively, from closed case files. Since the entrance criteria [for diversion] require that the participants pass more than a 'paper' screening, *the validity of these groups can always be attacked*". (Emphasis added.) *See* Mullen, *supra* note 1, at 40.

Zimring, in contrast, rejects categorically the validity of the quasi-experimental design and comparison (as distinct from control) groups, insisting that the only valid comparison with divertees can be otherwise eligible defendants affirmatively excluded by the program, rather than those who opt out or are channelled otherwise by the vagaries of the criminal justice process. Zimring, *supra* note 1. However, Professor Zimring and others have advocated, as a way around the legal and ethical problems of excluding otherwise eligible defendants from diversion on a random basis so as to form a "test tube" control group, the vitalization of an "overflow" group as the control. Briefly stated, "overflow" defendants are those screened as eligible but never actually offered the diversion option because program intake at the time is closed for some reason, *i.e.*, the defendants were arrested on weekends or the program was up to service capacity and unable to accept more enrollees.

For an explanation of and endorsement of the "overflow" control group as the optimal approach to this difficult subject, *see* Zimring, *supra* note 1, at 19; Crohn, *supra* note 10, at 84; and Pryor, D., Pluma, W., and Smith, J., *Pretrial Diversion Program in Monroe County, N.Y.: An Evaluation of Program Impact and Cost Effectiveness*, PRETRIAL SERVICES ANNUAL JOURNAL, 1978, 68, 72-74 (Pretrial Services Resource Center, 1978).

The five specific indicators that have been mentioned as appropriate subjects for research deserve a closer look.

1. *Recidivism:* An evaluation of recidivism is important in examining pretrial diversion agencies. First, it is a major rationale of certain diversion programs that if penetration into the criminal justice system is reduced for first offenders, then the recidivism rate of the first offenders should be exceptionally low.[14] Second, decision-makers often find recidivism to be the most important research question. Recidivism may be defined in three separate ways, *viz.*, in-program recidivism, (often called rearrest rate), short term post-program recidivism, and long term recidivism.[15]

2. *Employment Variables:* The early pretrial diversion programs were shaped by the manpower model. These programs involved extensive vocational counseling, skill training, and job placement services.[16] Generally, the research has shown that defendants have performed best using this outcome when they have had positive prior characteristics upon program entry.[17] When these variables are studied in the evaluation, problems are posed by the definitions of employment, wage levels to be measured, skills included in the examination, and the control of environmental variables such as change in the economy.[18]

3. *Psychological Variables:* Diversion programs suggest that because of the peculiar type of assistance given there are psychological changes in the defendant.[19] Some programs claim that psychological testing indicates that participant behavior and emotional state improved because of experiences with the program. Not only are these conclusions somewhat doubtful because of the lack of a control group and limited information, but these studies also indicate that the program's impact upon the psychological disposition of the defendant is a short term impact at best.[20] Programs ought to be relatively careful in using psychological testing (a clinical tool) to define the impact of the program on the defendant.

4. *System Impact:* Many argue that impact on the criminal justice system may be more important than the impact on the diverted defen-

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[14] For a good discussion of the recidivism issue—policy-maker perceptions of its importance as well as what constitues a valid measure of this variable—*see* Rovner-Pieczenik, *supra* note 1, at *xvi-xx* and 74-84.

[15] For a thorough discussion of the definition of "recidivism" for purposes of diversion evaluation, plus a review of the various ways to measure such, *see* Rovner-Pieczenik, *supra* note 1, at 74-84 and 139.

[16] Mullen, *supra* note 1, at 9; Rovner-Pieczenik, *supra* note 1, at 10-13.

[17] Kirby, *supra* note 1, at 7-8; Rovner-Pieczenik, *supra* note 1, at *xiv-xx* and 124; Zimring, *supra* note 1.

[18] Rovner-Pieczenik, *supra* note 1, at *xv* and 67-71.

[19] Rovner-Pieczenik, *supra* note 1, at 84-85.

[20] *Id.* at 132-136.

dant. Suggested system impact includes increasing alternatives for case processing, alleviating congested court calendars, decreasing the use of correctional institutions, and reducing the cost of the traditional criminal justice processing. Little research has been conducted that provides either quantitative or qualitative analysis on this topic.[21] Furthermore, research in this area generally has tended to be subjective, citing the opinions of diversion agency staffs as to their impact on the system.[22] The only systematic attempt to get at this variable has been through some of the cost benefit analyses.[23]

5. *Cost Analysis:* Cost benefit or cost effectiveness analysis can be among the most powerful forms of evaluation used by a program. It can confirm an argument about the savings provided by the diversion agency. This commentary suggests that cost benefit has a focus which limits its utility to the diversion field. Cost benefit analysis is often used without valid control groups or comparison groups and too often includes variables that cannot be measured in an objective way.[24] The use of indirect costs and benefits, intangible costs and benefits, as well as alleged tax savings, too often strains the imagination of the evaluator. The economic value put on these elements often reflects the personal opinions, values and predispositions of the persons doing or funding the evaluation. Furthermore, cost benefit analysis has been defined as a long range approach for assessing total social impact in the economic terms of pretrial diversion. It has come to be associated in its approach to academically oriented economists rather than to the practitioners. A more useful form of cost analysis is cost effectiveness. By definition cost effectiveness is a short range method for evaluating pretrial diversion programs with special emphasis on governmental savings. Cost effectiveness measurements are tied to actual diversion program costs versus savings effected in

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[21] However, *see* NEW JUSTICE, *supra* note 1, *Appendix B., The Alternatives Matrix*, at 59-83 (two-dimensional model of projected impact of use of various sorts and combinations of alternatives to conventional adjudication on other aspects of criminal caseflow).

This study, conducted by a respected team of American University Law school professors, concluded that "[r]ecently instituted alternatives to conventional adjudication [including pretrial diversion] . . . affect only a small portion of all cases which require disposition, while the conventional system of justice continues to be little affected" and "[a]lternatives to conventional adjudication are usually designed to deal with minor and non-violent crime and cannot be expected to have a noticeable, direct impact upon major street crime." *Id.* at *xi*.

[22] Rovner-Pieczenik, *supra* note 1, at 121-123.

[23] *See generally* the Watkins, Holahan, and Kirby & Corum monographs, *supra* note 8.

[24] Rovner-Pieczenik, *supra* note 1, at 92-94; NEW JUSTICE, *supra* note 1, at 23.

the budget of the local jurisdiction as a result of the existence of a diversion agency.[25] Generally, cost effectiveness analysis is limited to *internal costs* directly attributed to a program within a specific funding year and *variable costs* which are directly affected by the diversion program within the same funding period.

STANDARD 7.3 Research and Evaluation Should:

- Follow Methodology Which Is Appropriate To The Program In Order To Generate Credible Results;
- Follow A Format Which Can Be Easily Communicated And Understood;
- Be Conducted By Individuals With Appropriate Expertise.

COMMENTARY

A. *METHODOLOGY*

Reviews of evaluation in diversion have concluded that major technical problems have led to little confidence in the suggested results.[26] Thus, the claim that diversion programs have a substantial impact upon the divertee's behavior has not been validated so far. For example, the study by Roberta Rovner-Pieczenik indicates, "Several programs validly demonstrated a decrease in participant recidivism during the period of the program." She also states that: "Methodological difficulties inherent in

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[25] For a detailed explanation of how cost effectiveness can validly be measured with regard to pretrial diversion, plus an analysis of some of the falacies inherent in earlier approaches, see Rovner-Pieczenik, *supra* note 1, at 92-102.

However, at least one recent commentator cautions against over-reliance on cost-benefit analysis, even where it is properly designed methodologically:

> Techniques of Economic evaluation such as cost-benefit analysis are relatively new and incompletely understood tools in the arsenal of criminal justice evaluators. Perhaps too much is expected of this one tool. To date, cost-benefit analyses in evaluations of alternatives have generally been marked by failure to include important potential benefits and cost, and by insufficient attention to the quality and accuracy of the data used.
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> There remains a more fundamental problem with cost-benefit analysis: cost-benefit analysis compares 'input' to 'output'. It was originally developed to analyze the comparative efficiency of factory production lines, where production techniques ('process') are understood. Its use in criminal justice is speculative because our understanding of how projects 'work' and how they 'work best' is inadequate. In an assembly line, uniform manufacturing processes will yield uniform products. In a criminal justice program, the same services provided to two different defendants may affect each differently. Thus, while cost-benefit analysis can be useful in comparing projects to other projects and to other possible expenditures of public funds, it should be used only *after* an adequate evaluation of the project, treating both 'process' and 'impact', has been performed. . . . Cost-benefit analysis should never be used as the *sole*, or even the *main*, criterion for evaluation of alternatives. (Emphasis original.)

NEW JUSTICE, *supra* note 1, at 23-24.

[26] Kirby, *supra* note 1, at 29-30; Mullen, *supra* note 1, at 10-11, 23; Rovner-Pieczenik, *supra* note 1, at *xv-xx*.

the evaluations research conducted by most programs did not enable us to conclude whether this finding was consistent among all programs, or whether it could be extended into a post-program period.[27]"

1) In order to infer validly that a program is having an effect on the defendant, an experimental design should be used. An experimental design randomly assigns defendants to either an experimental (diverted) group or a control (non-diverted) group. Random selection ensures that the prior characteristics of the two groups are the same and that any differences in terms of recidivism, employment characteristics, *etc.*, are due solely to the impact of the program on defendants. Experimental designs are seldom used by programs. Among the arguments against the experimental model are;

   - legal and ethical problems with random assignment;
   - the fact that many programs are not familiar with the technique of experiments;
   - the period of time required to obtain the results of the experiment (often, more than two years);
   - difficulties in implementing random assignments in a real world setting;
   - the question whether defendants should be deprived arbitrarily of participation in a program; and
   - the high cost of conducting such a study.

   On the other hand, defenders of the experimental design argue that controlled experiments are the only way to know the true impact of a program.[28] Suffice to say that relatively few programs are able to implement an experimental design.
   At the same time it seems that whenever research funded by federal agencies is conducted on a national level, that type of research should always include an experimental design. This is the only way to attempt a more definitive answer to the question of the impact of diversion. Major research efforts at the national level have developed new ways of implementing experimental designs, such as using an overflow group to supplement the strictly random assignments of individuals or using the random procedure to select time periods during which individuals will be assigned to control or experimental groups.[29]
2) At the local level, it may be far more appropriate to use a quasi-experimental design.[30] Such a design artificially constructs a group

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[27] Rovner-Pieczenik, *supra* note 1, at xv.

[28] *See e.g.*, Zimring, *supra* note 1, at 235-236.

[29] *See* note 13, *supra*.

[30] Kirby, *supra* note 1, at 8; Beeson and McMasters, *supra* note 6, at 58-60.

from court records with characteristics similar to those of a defendant group in the diversion program. This may include:

- a group of defendants who would have been eligible for diversion before the program started; or
- a group of defendants eligible for diversion but who rejected it or were rejected by the prosecutor; or
- a group of defendants who might be eligible for diversion but were not screened by the program because the program was not operating at a particular time of the day or week.

A major problem with quasi-experimental design is that the comparison group may not be exactly similar to the group of agency participants. Every effort should be made by the researcher to determine if they are comparable. This means that their background characteristics (*e.g.*, current charge, age, sex, prior record, employment, *etc.*) should be examined to see whether both groups are equivalent. If the researcher can demonstrate equivalence, then any differences in defendant behavior between the diverted group and the comparison group can be used to support an argument that the program has an impact on the defendant. It is obvious that the quasi-experimental design has some problems in that truly random procedures were not used to assign defendants to the two groups. It might be that in spite of efforts at determining equivalance, the defendants' groups may be different. The quasi-experimental design faces legal and ethical opposition.[31] It is readily accepted as legitimate by most researchers and decision-makers.

The steps in the quasi-experimental procedure include:

- identification of the diverted group;
- ascertainment of personal criminal characteristics of the group;
- identification of a comparison group with similar characteristics, making tests and adjustments as necessary; and
- comparison of the performance of the two groups.[32]

3) Evaluations without the use of experimental or quasi-experimental design cannot offer trustworthy results. Too often programs compute recidivism, rearrest, and employment statistics for the program participants only. Claims are then made that the relatively low level of recidivism and high level of employment demonstrate that the program is having a substantial impact on the defendant.[33] Since programs often practice "creaming" such statistics are misleading.[34]

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[31] *See* Kirby, *supra* note 1, at 8; and Mullen, *supra* note 1, at 44-45; and Adams, *supra* note 4, at 72-73.

[32] *See* Rovner-Pieczenik, *supra* note 1, at 22-50; Mullen, *supra* note 1, at 10-11; and Beeson & McMasters, supra note 6, at 58-60.

[33] The dangers of indiscriminately ascribing divertee "improvement" and "progress" to program participation have been stressed by a number of leading commentators. *See* Johnson, *supra* note 1, at 10, 23; Rovner-Pieczenik, *supra* note 1, at xv-xvi.

[34] Kirby, *supra* note 1, at 7-8; Mullen, *supra* note 1, at 10,23; Zimring, *supra* note 1.

Furthermore, research indicates that individual characteristics of defendants prior to their entering (diversion) play an important role in determining in-program and post-program success.[35] The following characteristics were associated with success in several programs; employment at the time of program entrance, good employment history, infrequent or no prior arrests, age, educational level, marital status and sex.[36] Program statistics which include no comparison or control groups may simply be documenting the fact that the program chose good risks as program participants and (quite possibly) that diversion was not necessary for those individuals.

B. *GUIDELINES IN CONDUCTING RESEARCH*

A number of guidelines should be adhered to in performing research for diversion agencies. They include the following:

1) The evaluator ought to state precisely and explicitly the assumptions made in conducting the research; the definitions used in the research; and the precise way in which the variables were operationalized and measured. It makes a considerable amount of difference if recidivism is defined as an in-program period or a period after termination of the defendant's participation in the program. In order properly to understand evaluations, these terms ought to be defined as precisely as possible.
2) Comparison and control groups should be validated to determine whether differences in prior characteristics might be responsible for the differences in outcomes between the two groups.
3) Data for program participants should include information concerning both the defendants who completed the program and those who did not. For example, one of the criteria of program success is rearrest rate while in the program. Some programs artificially improve their statistics by eliminating those individuals who have failed in the program.
4) Pre and post measures of both diverted and (nondiverted) control groups should be attempted. This will demonstrate whether the defendant's behavior was affected by diversion.
5) A proper follow-up period should be used in measuring outcare variables such as recidivism rate. One to three years after program completion or termination would seem to be the very least required. Analysis of rearrest or recidivism during program participation does not address what happens to defendants once they have been released from program supervision.

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[35] Kirby, *supra* note 1, at 8; Abt Report, *supra* note 1, at 132; Rovner-Pieczenik, *supra* note 1. at *xiv-xx*.

[36] Rovner-Pieczenik, *supra* note 1, at *xv-xvi*; Kirby, *supra* note 4, at 8; Zaloom, J., *Pretrial Intervention Under New Jersey Court Rule 3:28, Proposed Guidelines for Operations*, reprinted from CRIMINAL JUSTICE QUARTERLY as ABA Pretrial Intervention Article Reprint No. 2 (January, 1975) at 13-14, 20.

6) Sample size should be adequate to support results. Small sample sizes will affect the findings, and some statistical measures may not be valid with overly small sample sizes.
7) The researcher ought to be alert to changes in the character of the population. Such things as maturation of the client, changes in the program, external changes (*e.g.*, in the employment or job market, *etc.*) are important variables.

C. *RESEARCH UTILIZATION*

One of the problems affecting research and evaluation is that it is not fully utilized by the target audience. Many evaluators feel that program administrators are reluctant to utilize research. Yet, "administrators will innovate, in the absence of research, on the basis of poor research, or with good research. One of the administrator's problems is that research is almost nonexistent."[37] The national study by Rovner-Pieczenik (cited *supra*) indicated that "the policy-makers (had) a great skepticism of evaluation research, in general, and recidivism statistics, in particular. Research conclusions based on statistics were respected by policy-makers primarily when they confirmed preexisting opinions." Stuart Adams further buttresses this conclusion when he argues that studies with the crudest design had the greatest impact on decision-makers. These two sources may have given researchers and program personnel insight on presenting evaluation results to decision-makers. Reports filled with statistics and technical jargon are difficult for decision-makers to understand. Therefore, in preparing reports, programs ought to be encouraged to use a logical and consistent approach which can be read easily by both decision-makers and researchers.

D. *CHOOSING A RESEARCHER*

This aspect of the research project is exceptionally important. Problems with consultants consistently occur throughout the entire criminal justice system. Such problems include:

1) evaluators are not responsive to the needs of decision-makers;
2) the expertise of the consultant is often questionable;
3) evaluators are frequently caught in conflicts of interest, especially when subsequent evaluation monies might be available; and
4) evaluators are often unfamiliar with the criminal justice system in general and pretrial diversion specifically.

It is not entirely clear what type of evaluator provides the best researcher for the agency. The in-house research staff may be a good solution, but suffers from a problem of conflict of interest. Most programs are unable to support a separate research staff.

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[37] Rovner-Pieczenik, *supra* note 1, at *xviii*.

[38] *Id.* at *xviii-xix*.

University faculty usually are technically superior in methodological skills and are available in most communities. University researchers may often turn the evaluation into academic research at the expense of assistance to the agency. They often resort to technical jargon which hinders communications. Finally, academicians may fail to consider the time constraints placed upon the agency in order to produce results.

Private consulting firms, on the other hand, generally are more expensive than the options cited above and may be strong in evaluation techniques but weak in knowledge of the criminal justice process. In addition, since they are profit motivated, they may be caught in the money conflict of interest situation referred to above.

Private not-for-profit organizations operating at the national level generally produce studies of high quality. Unfortunately, their number is limited, and their non-availability at the local level may increase the costs.

In choosing a vendor, there is no one answer as to the particular type of evaluator who should be employed. The program ought to be aware of the issues raised and choose the vendor with the greatest probability of producing valuable work, taking into account the budgetary resources of the agency. Furthermore, if agencies do not have funds available to them for evaluation research, they ought to investigate the possibility of using student interns, or working with university professors and graduate students who are working on their theses.

STANDARDS

8.1 The Staffing Of Diversion Programs Should Be Directly Related To The Number Of Divertees, The Scope Of Services To Be Provided In-House, And The Kinds Of Defendants Who Are Likely To Be Diverted In That Community.

8.2 Diversion Programs Should Include No More Direct In-House Services Than Are Necessary To Accomplish Their Mandate. When Other Programs Already Exist In The Community And Can Adequately Provide Certain Services, Duplication Should Be Avoided.

8.3 Staff Should Be Selected On The Basis Of Skills And Experience. And, Should Have Sound Judgment, Stability And Sensitivity To Participants.

8.4 Staffing And Advancement Should Follow Affirmative Action Guidelines And Labels Such As Professional And Para-Professional Should Be Discouraged.

8.5 Diversion Programs Should Be Committed To The Implementation Of Effective Managerial And Service Delivery Techniques And Should Provide Staff With The Opportunity To Enhance Their Skills.

8.6 The Use Of Volunteers And Students Should Be Encouraged. Volunteers And Students Should Be Expected To Deliver Quality Work Products.

GENERAL COMMENTARY

Organizational structures of diversion programs vary considerably and no model format is offered in this document. There are many reasons for this. Communities differ in sizes, make up, availability of local resources, and monies. Criminal justice systems also vary from county to county with some providing public defender representation, and others none.

Sometimes substantial court backlogs exist. These considerations, in part, determine the staffing and organization of diversion programs and flexibility is not only understandable, but necessary.[1]

Certain principles, on the other hand, should be adhered to.

A. Diversion programs should contain the following divisional capacities:
   1. Executive. There should be a chief decision-maker accountable for the program's performance and orientation and for primary liaison with funding agencies, the criminal justice system, and the community.
   2. Operational. There should exist the capacity to deliver services to the defendants either directly or through referrals.[2]
      a) When efficient local resources exist, these services should not be duplicated in-house. The use of community resources can represent not only substantial savings in facilities and staff costs, but can also widen the range of expertise brought to defendants. Most of the community agencies function in a peripheral fashion to the criminal justice system and often lack the understanding of the specific situations of diversion participants. Diversion programs should include a core staff trained and attuned to the particular nature of the divertee and the legal implications of his situation. This core staff should be given the responsibility of coordinating and tracking services delivered to participants by outside agencies.[3]
      b) When competent outside agencies are not available, the diversion program should develop the necessary in-house programs until such time as a community program can offer the appropriate assistance.
   3. Court Liaison. A portion of the staff should be vested with the responsibility of verifying that eligibility guidelines and program criteria are adhered to and properly communicated to the court. In certain programs, this function is assigned to screeners or in-

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[1] For extended discussion of desirable diversion staffing patterns, which take account of such variables as these, see Watkins, A., COST ANALYSIS OF CORRECTIONAL STANDARDS: PRETRIAL DIVERSION, VOLUME II, 15-21, 31-44 (LEAA, 1975); ABA Pretrial Intervention Service Center, PRETRIAL INTERVENTION SERVICES: A GUIDE FOR PROGRAM DEVELOPMENT, 32-42 (Washington, D.C., 1977); and Zaloom, J., PRETRIAL DIVERSION UNDER NEW JERSEY COURT RULE 3:28 PROPOSED GUIDELINES FOR OPERATION, 9, 19-20 (ABA PTI Service Center, January, 1975) (hereinafter cited as Zaloom).

For a review of specific staffing patterns of several established pretrial diversion programs, see Mullen, J., THE DILEMMA OF DIVERSION: RESOURCE MATERIALS ON ADULT PRE-TRIAL INTERVENTION PROGRAMS, at 88-90 (Operation DeNovo), 99-100 (Boston Court Resource Project), and 110-112 (Dade County PTI Program) (LEAA, 1976).

[2] See Standards 3.2 & 3.3, *infra*, and accompanying commentary.

[3] Zaloom, *supra* note 1, at 9; *Hearings on S. 1819, The Federal Criminal Diversion Act of 1977, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 96th Cong., 2d Sess. at 78, 83 (statement of Pretrial Services Resource Center Director Madeleine L. Crohn) (hereinafter cited as Crohn).

terviewers. These people should constitute a separate unit from that of the service delivery staff. In some programs the two functions are combined. In others, defense counsel act as court liaison. Some programs act upon referrals from some or all elements of the criminal justice system. Regardless of the format adopted, it is essential that someone in each diversion program be vested with the responsibility of verifying that agreed-upon guidelines are adhered to.

4. Administration. A division capable of documenting the diversion program activities for the purposes of programmatic and financial accountability, and for research (whether research is conducted in-house or by outsiders) should be established.

The amount of staff necessary to carry out these functions will vary greatly. Some programs have a staff of one vested with all the above responsibilities. At least one diversion program has had a staff as large as 250 employees. The functions are essential.

B. The purpose of diversion programs is not to create a bureacratic layer parallel to or within the criminal justice system. Recruitment and supervision of personnel should follow principles of sound management. The number of positions should be limited to those necessary for carrying out programmatic mandates. Positions should be deleted when certain work components can be as easily carried out elsewhere (as long as the essential functions listed above are fulfilled). Certain tasks can be effectively carried out by volunteers and students and for cost effective reasons (as well as involvement of the community) their recruitment should be encouraged.

C. Composition of staff should be reflective of the community, avoid rigid classifications and follow affirmative action guidelines. Historically, most pretrial diversion programs have included staff that was academically trained and staff whose backgrounds and experiences were representative of the program's participants (community people with street experience and/or ex-offenders). This combination has existed at all staff levels except when specific training in psychology, research, sociology or law was necessary. For certain positions (generally those where direct contact with divertees takes place), program hiring has focused on the overall personality, skills and aptitude an applicant needs to perform the job rather than on narrower academic qualifications. Much discussion over the years has addressed the question of who makes the "better" staff member, someone with a college degree or someone who understands, as a result of his own experience, the conflicts and problems that daily confront most of the program's participants. To date, none of the studies have been able to determine which option is better. On the other hand, proponents of one or the other theory often reflect their particular backgrounds.

Because diversion programs generally encompass a wide variety of staff members, thereby enriching their approach, it is suggested that a mix of

academically and non-academically trained staff be considered. This mix enables the diversion program to offer job opportunities to individuals in the community who otherwise might be denied access to meaningful employment because of their lack of academic qualifications.

At the same time, the final disposition of the charges against the participant largely depends on the relationship a counselor establishes with a participant, what the counselor perceives that the participant requires in the way of assistance, and, finally, his subjective appraisal of the participant's motivation, cooperation and initiative.

The program administrator should insist on the following specific attributes when hiring staff who have direct contact with participants:

- Commitment—a genuine concern for people in trouble and willingness to put oneself out in order to see that divertees receive fair treatment and help with problems related to or exacerbated by their status as criminal defendants;
- A high level of integrity—so that both participants and the system—*e.g.*, the judge—can have trust in them and know that they are being forthright;
- Good judgment—the capacity to be fair, reasonable, and consistent;
- Normal intelligence—ability to learn complete policy and procedural information in a short time;
- Literacy—the ability to read, fill out forms, and write simple narrative reports especially those people engaged in screening cases for pre or post trial decisions by the court; and
- Sensitivity and alertness—qualities that are important in interviewing.[4]

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[4] *See* Zaloom, *supra* note 1, at 9, 19; Crohn, *supra* note 3, at 82.

As long as the individual hired for the job fulfills these qualifications and does a commendable job, the rigid classifications of professional and non-professional should be avoided. This is not to suggest that no difference exists between those academically trained and those who are not or that any personnel regardless of background will be able to occupy certain professions requiring specific training or technical knowledge. Rather, labelling (as opposed to evaluation of skills and potential) can operate as a divisive influence and prevent competent individuals from legitimate upward mobility.

The same reasoning applies to the affirmative action concept. On the basis that academic credentials and professional training are not the only reliable criteria for hiring qualified staff for pretrial diversion programs, personnel should be chosen following a combination of job-related ability or aptitude tests, an oral interview, and some background investigation.

Although some programs try to match the background of staff (in particular, counselors) with the population the program services, such activity may miss the mark. Staff should certainly be sensitive to and aware of the special needs of program participants. Some argue that "unless you've been there" you can't be much help. Certainly the problems—social and otherwise—that have contributed to the present situation of any divertee are myriad. Need they be experienced to be understood? Rather, staff should be selected with a concern for balancing the interests and needs of program participants with the needs and pressures of society. Minority groups should receive particular attention in the recruitment process.

D. For all the above reasons as well as in keeping with general management concepts, diversion programs should be able to upgrade the skills of its staff. Some programs have the capacity of providing in-house training. Such a method is ideal since it can be more easily adapted to specific program needs. Additional alternatives include subsidizing staff to attend regular college courses, using outside instructors, locating available monies related to professional development, *etc.* Most existing programs have indicated a need for such professional development at all levels. Credibility and performance of the diversion discipline can only be enhanced by a concerned effort in this direction.

The Process

At previous annual conferences of the National Association of Pretrial Services Agencies (hereinafter NAPSA), the membership expressed the need to develop standards for pretrial release and diversion that would reflect the experience and concerns of persons working in the field. After preliminary work by volunteer committees, NAPSA received a grant from the Law Enforcement Assistance Administration to develop standards and goals with a view toward improving the performance of courts and agencies providing pretrial services. The task of initial research and drafting of the Standards was assigned to two committees, one for release and the other for diversion. To elicit the views of the membership, a final working draft with commentaries was completed in April, 1977. It was distributed for review and comments at the NAPSA Annual Conference in Washington, D.C., May 10-13, 1977. This appendix outlines the response of the membership at that conference to the Conference Initial Draft of the Pretrial Release and Diversion Standards and Goals.

CONFERENCE REVIEW PROCEDURES

1. *Preliminary Review:* A few weeks prior to the Annual Conference, each pre-registered conference attendee was mailed the Introduction and Standards, without the Commentary to the Standards. The complete Conference Draft, including Introduction, Standards, and Commentary, was included in the Conference Notebook, and distributed to each conference participant at registration.

2. *Discussion Groups:* The conference program scheduled group discussions of the Standards and Goals on two consecutive mornings. Four workshops on pretrial release standards and four workshops on diversion standards were held simultaneously. Each workshop consisted of approximately twenty persons and was conducted by a Facilitator and Resource Person. The task of the Facilitator was to guide the discussion in a neutral fashion and to record and summarize the content of the discussion. A Resource Person who had participated in the development of the Conference Draft was present to clarify language of the draft, to participate in

the discussion, and to obtain direct feedback on the substantive content of the Standards. A Workshop Coordinator met with the Facilitators in a training session prior to the workshops and again after each morning's discussion to collect and summarize the Facilitators' notes.

3. *Written Comments:* In addition, each Facilitator distributed a short form designed to elicit comments from each workshop participant. Participants were asked to express their opinions in more detail and to review any issues not sufficiently covered in the workshop discussions. These forms were distributed on the morning of the first workshop and collected at the end of the conference. The written comments were synthesized into a report and submitted to the Standards and Goals Project committee. In addition, the regular conference evaluation form included space for comments on the Standards and Goals workshops. These comments were also forwarded to the Standards and Goals committee. Finally, the project committee received supplemental comments through individual correspondence.

Although the response of the conference participants was a valuable contribution, a number of problems were encountered in the administration of the feedback process. First, the format of the Conference Draft and the time available for reading the entire document were not conducive to complete review by the membership: many persons were able to read only the Standards, thus missing a number of critical issues covered in the Commentary. Second, the workshop setting, though productive as far as stimulating discussion, did not allow time to cover all major issues; the discussions tended to focus on a few highly controversial issues and on the opinions of a vocal few. Third, the review procedures did not produce the quantity of written responses initially anticipated.

In spite of these difficulties, however, the overall response to the Standards and Goals Workshops was positive. Many conference participants felt that they had ample opportunity to comment on the Standards and that they were making an important contribution to the development of NAPSA policy.

Responses To The Conference Draft.

Most of the conference attendees agreed that the concept of Diversion was important enough to require careful monitoring to insure that persons were not enmeshed in the system when they might otherwise not have been. There was a consensus that many diversion programs "wasted" resources and talent dealing with people who needed no assistance merely to accommodate societal pressure. At the same time, there were many areas of disagreement.

One of the major disagreements among Conference participants was the overall approach taken in developing the standards and goals. The question which arose most frequently throughout the discussions was "Should the Standards and Goals reflect what we feel would be an 'ideal' system of pretrial release or diversion, or should the Standards and Goals be developed within the parameters of what we feel is achievable in the near future?"

On the one hand, many persons felt that with respect to goals particularly, NAPSA should articulate what it feels pretrial systems should be—regardless of political or practical realities. By doing this, it was thought, the document would articulate the ultimate objectives of reform of pretrial practices.

On the other hand, many Conference participants argued that approaching the Standards from the posture of the ideal world would limit their utility as timely guidelines for action. By being more realistic, they argued, the Standards might have greater impact on policy decisions currently being faced by the courts, legislators, and pretrial services agencies.

In the course of discussions, it was clear that both positions—the "ideal world" and a reality-orientation—often had merit. For example, after discussing what a "Goal" is and what a "Standard" is, it was suggested that diversion should be considered a process that truly avoided the stigma associated with criminal justice processing. As such, it was argued, the prosecutor should not control the process. As a goal such a position might represent an ideal but as a practical matter, prosecutors, as part of the executive branch of government, have final say. As a compromise, some felt that the standards could state the ideal with the commentary suggesting what avenues could be pursued to reach that ideal.

The areas of conflict discussed by the participants were in many ways predictable, they were areas that have long been debated by judges, legislators, administrators and pretrial services programs. Among the controversial diversion issues confronted were:

1. *Separation of Powers:* One of the most controversial discussions focused on the issue of where control of the Diversion process should be fixed. Since it is the Prosecutor's duty and prerogative to prosecute or not should he have control? Should the Court be given authority to "monitor" the process to insure equal treatment? Should the Programs decide who was worthy and be able to force Courts and Prosecutors to defer to their evaluations? It became obvious that no consensus could be reached on where the lines should be drawn. There was agreement, however, that the process should be monitored by all parties so that whatever standards were reached could be implemented with fairness and consistency.

2. *Eligibility Criteria:* Fear of over-reach (the practice of putting a defendant into a service delivery program with more requirements than he might have had if he had elected the ordinary process or even including people who might never have proceeded past the initial police charge stage) was a second area that provoked heated discussion. On the one hand it was argued that no one should be enrolled in a diversion program if he was innocent or if he could be successful in his legal challenge to prosecution. Another argument urged that any method that might permit a person to wipe out any record of arrest along with the stigma that normally accompanies the criminal process should be permitted. Still others argued that the real work to be done should focus on hardened criminals who needed services to become rehabilitated. They maintained that if these types of people could be "turned around" a real service would have been done.

Such issues as building a good track record for community acceptance and future funding, protecting community safety, breaking the chain of criminality, *etc.*, were also debated during the discussion of eligibility. Again, no consensus could be reached.

The arguments—both the general philosophical discussions and the specific disagreements over definitions—produced a great deal of heated discussion. Regardless of personal opinion, it was apparent to Conference participants that there were merits to both sides of the issues involved. Thus, it could not be expected that the Standards and Goals could reflect a consensus of participants' views: the theoretical differences were too great to bridge.

3. *The Role of the Pretrial Services Agency:* The third major area of dispute among conference participants was the role of the pretrial services agency with respect to the adjudication process. In the Conference Draft of the Standards and Goals it was recommended that the pretrial services agency maintain a neutral posture, serving as advocate for neither the defendant nor the prosecution. The pretrial services agency was viewed as a mechanism for serving the goal of delivery of equal justice, with its operations and policies being directed toward promoting the rational use of the diversion process.

Although not nearly as controversial an issue as the separation of powers issue, many participants disagreed with the above. A substantial number felt that pretrial services agencies should consider themselves advocates for the defendant, promoting the use of diversion in as many cases as possible. By losing sight of defendant advocacy, it was maintained, pretrial services agencies would lose sight of their reform orientation, and evolve into little more than another layer in the criminal justice bureaucracy.

In contrast, other participants—particularly those working with older and larger pretrial services agencies—felt that neutrality was critical to the establishment of credibility with the courts and prosecutor. This credibility in the long run, would enable the agency to have a greater degree of influence and therefore obtain diversion for more defendants.

This difference was not resolved at the workshops and led into a discussion of pretrial services agency operations. It was felt that the Standards did not adequately address the "hows" and "whys" of day-to-day activities: What types of information should a pretrial services agency collect? Who should have access to that information? What kinds of supervision should be imposed upon defendants? Again, the opinions varied, often in line with the kinds of operations used in conference participants' own programs.

4. *Use of Standards and Goals:* A final major area of question was what individual NAPSA members should do with the Standards and Goals. Should the Standards be viewed as guides for designing daily program operations? Should they be used for lobbying at state legislatures? Should they be used in court cases? Perhaps the most critical question confronting the conference participants was what to do if the Standards were in contradiction with state statutes, local court rules, or local jurisdiction practices.

For the most part, discussion of these issues revolved around using the Standards as reference material for influencing policy decisions on the local level. In this area the participants appeared to agree that the Standards as a whole would be useful in such lobbying, even if they were in contradiction with their own opinions on one or two points.

5. *Other Specific Comments:* While the issues discussed thus far represent the major areas of controversy or concern, many more specific comments were offered regarding the wording of key phrases, clarification of specific provisions, pretrial services agency operations, and overall organization.

Final Review Procedures.

After all of the comments generated at the 1977 Conference were collated they were forwarded to the Project Director who then met with the assistant Coordinator for Diversion and staff. A new draft was prepared and submitted for comment to the Board of Directors of NAPSA and to the Special Review Panel described in Appendix B.

In early March comments from all those who had submitted them were reviewed by the Project Director and a consultant writer. The final draft was prepared and submitted to the printer in August.

Conclusion.

As has been mentioned, this final draft represents only the first step in what should become an ongoing evaluative process. As the Standards are analyzed and used and as time changes needs they should be updated. A careful effort has been made to insure the best interests of society as represented by the courts and the accused but it is certain that where rights are in conflict, perfect balance is difficult to achieve. It should be our continuing goal to seek to achieve that balance.

Review Panel

1. Honorable Peter Bakakos—Judge, Circuit Court, Cook County, Chicago, Advisory Board National Association of Pretrial Services Agencies (NAPSA).
2. John P. Bellassai, Esquire—Director, Superior Court Narcotics Pretrial Diversion Project.
3. Honorable Irwin Brownstein—Judge, New York State Supreme Court, Advisory Board NAPSA, Board of Trustees Pretrial Services Resource Center (PSRC).
4. Honorable John A. Calhoun—Commissioner of Youth Services, Boston, Mass.
5. Robin Farkas—Senior Vice President, Alexander's Inc., New York, Advisory Board NAPSA, Board of Trustees PSRC.
6. Daniel J. Freed, Esquire—Professor, Yale Law School, New Haven, Connecticut, Advisory Board NAPSA.
7. Honorable Joseph Glancey—Judge, Philadelphia Municipal Court, Advisory Board NAPSA.
8. Barry Glick—Police Foundation, Advisory Board NAPSA.
9. Richard D. Hongisto—Sheriff, Cleveland, Ohio, Advisory Board NAPSA.
10. Arnold Hopkins, Esquire—Director of Probation and Parole for the State of Maryland, Advisory Board NAPSA, Board of Trustees PSRC.
11. Wayne Jackson—Chief, Division of Probation, Administrative Office of U.S. Courts, Advisory Board NAPSA.
12. Robert Leonard, Esquire—Prosecutor, Flint, Michigan.
13. Barry Mahoney, Esquire—National Center for State Courts, Denver, Colorado, Board of Trustees PSRC.
14. Martin J. Mayer, Esquire—Director Criminal Justice Planning Unit, Los Angeles.
15. Doris Meissner—Assistant Director, Department of Justice, Advisory Board NAPSA.
16. Norval Morris, Esquire—Dean, University of Chicago Law School, Advisory Board NAPSA.
17. Donald Murray—Director, National Association of Counties.
18. Sheldon Portman, Esquire—Defense Attorney in private practice.

19. Robert Rovner-Pieczenik—Research Attorney.
20. Herman Schwartz, Esquire—Professor of Law, Advisory Board NAPSA.
21. Herbert Sturz, Esquire—Executive Director, Vera Institute of Justice, New York, Advisory Board NAPSA.
22. Wayne Thomas, Esquire—Attorney in private practice.
23. Anthony Travisono—Executive Director, American Correctional Association.
24. Preston Trimble, Esquire—District Attorney, Norman, Oklahoma, Advisory Board NAPSA, Board of Trustees PSRC.
25. Rick Tropp, Esquire—Advisory Board NAPSA.
26. Guy Willetts—Chief, Pretrial Services, Administrative Office, U.S. Courts.
27. Franklin Zimring—Professor, University of Chicago, Advisory Board NAPSA.